



**CORNELL UNIVERSITY LAW LIBRARY**

**The Moak Collection**

---

**PURCHASED FOR**

**The School of Law of Cornell University**

**And Presented February 14, 1893**

**IN MEMORY OF**

**JUDGE DOUGLASS BOARDMAN**

FIRST DEAN OF THE SCHOOL

**By his Wife and Daughter**

**A. M. BOARDMAN and ELLEN D. WILLIAMS**



Cornell University Library

**KF 1375.L74 1888a**

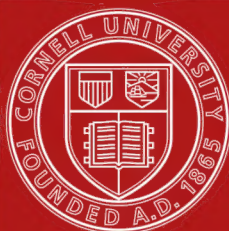
v.1

**A treatise on the law of partnership.**



3 1924 019 246 846

law



## Cornell University Library

The original of this book is in  
the Cornell University Library.

There are no known copyright restrictions in  
the United States on the use of the text.









# THE LAW OF PARTNERSHIP.





A TREATISE  
ON THE  
LAW OF PARTNERSHIP.

FIFTH ENGLISH EDITION.

BY  
THE RIGHT HONORABLE  
SIR NATHANIEL LINDLEY, KNT.,  
ONE OF THE LORDS JUSTICES OF HER MAJESTY'S  
COURT OF APPEAL;

ASSISTED BY  
WILLIAM C. GULL, M.A.,  
OF LINCOLN'S INN, ESQ., BARRISTER-AT-LAW,  
VINERIAN SCHOLAR IN THE UNIVERSITY OF OXFORD, 1883,

AND  
WALTER B. LINDLEY, M.A.,  
OF LINCOLN'S INN, ESQ., BARRISTER-AT-LAW.

SECOND AMERICAN EDITION.

EDITED AND ANNOTATED  
BY  
MARSHALL D. EWELL, LL. D.

IN TWO VOLUMES.  
VOL. II.

CHICAGO:  
CALLAGHAN AND COMPANY,  
1888.

*M1337*

Entered according to the Act of Congress, in the year 1888, by

CALLAGHAN AND COMPANY, .

In the office of the Librarian of Congress, at Washington, D. C.

DAVID ATWOOD,  
PRINTER AND STEREOTYPEE,  
MADISON, WIS.



# AUTHORITIES REFERRED TO BY THE AUTHOR.

[The pages in which a case is particularly referred to in the text, and is not merely cited, are in the following list denoted by an asterisk (\*).

[The cases in each sheet have been brought down to the latest possible moment. It ought, however, to be mentioned that no attempt has been made to collect cases decided since the establishment of the law reports and not reported therein.]

[Table of American Cases, *post.*]

[THE REFERENCES ARE TO THE MARGINAL PAGES.]

Abbott v. Burbage . . . . .	631	Agra Bank, Ex parte . . . . .	679, 680
— v. Smith . . . . .	200, 299	Agra and Masterman's Bank,	
Abel v. Sutton 215, 216, 218, 219,*		Re . . . . .	712
	667, 673	— v. Hoffman . . . . .	291
Abell, Ex parte . . . . .	73*	A.-G. v. Birkbeck . . . . .	96
Abraham v. Hannay . . . . .	462, 463	— v. Borrodaile . . . . .	61
Acerro v. Petroni . . . . .	90	— v. Brunning . . . . .	348
Ackerman, Ex parte . . . . .	731	— v. Burges . . . . .	149
Ackroyd, Ex parte . . . . .	645	— v. Great Northern Rail-	
Acraman v. Bates . . . . .	682	way Co. . . . .	316
Adam, Ex parte . . . . .	746, 747	— v. Higgins . . . . .	340
— v. Townend . . . . .	266	— v. Hubbuck . . . . .	347
Adams, Ex parte (3 M. & A.)	716	— v. Marquis of Ailesbury	347
— (1 Rose) . . . . .	726	and Add. to p. 347	
— v. Bankhart . . . . .	129	— v. Mayor of Norwich . . . . .	372
— v. Bingley . . . . .	143	— v. Siddon . . . . .	148, 149
Adamson, Ex parte 199, 200, 702,		— v. Weeks . . . . .	149
	745, 746	— v. Wilson . . . . .	377, 379
— v. Jarvis . . . . .	370, 377, 378	Airey v. Borham . . . . .	68, 381*
Addams v. Ferick . . . . .	594	Aitcheson v. Lee . . . . .	665, 675
Addie v. Western Bank of		Akhurst v. Jackson . . . . .	65, 67
Scotland . . . . .	163	Albion Life Assur. Soc., Re 32,	385
Addis v. Knight 291, 493, 591, 599,		Albrectht v. Sussmann . . . . .	72, 73
	648	Alcock v. Taylor . . . . .	121
Addison, Ex parte (3 De G. &		Alder v. Fouracre . . . . .	307, 496, 541
Sm.) . . . . .	633	Alderson v. Clay . . . . .	41, 86, 87
— (3 Mon. & Ayr.) . . . . .	632	— v. Pope . . . . .	141, 170, 174,* 175*
— v. Overend . . . . .	278, 279	Alexander, Ex parte . . . . .	120
Adley v. Whitstable Co. . . . .	395, 537	— v. Barker . . . . .	275
Affalo v. Fourdrinier . . . . .	752	— v. Simms . . . . .	61, 355
Agace, Ex parte 146, 165,* 166, 171,		Allcard v. Weeson . . . . .	753
	703	Allen v. Bonnett . . . . .	630, 631
Agacio v. Forbes . . . . .	277	— v. Hartley . . . . .	632
Agar v. Fairfax . . . . .	59	— v. Kilbre . . . . .	542, 588, 669
— v. Macklewh . . . . .	451	Alletson v. Chichester . . . . .	680

Allfrey v. Allfrey . . .	512, 513	Ashworth v. Outram . . .	78
Alliance Bank, Ex parte . . .	713	— v. Stanwix . . .	149
Alliance Bank Limited v. . .		Aspinall v. London & North-	
Kearsley . . .	129	western Railway Co. 135, 146,	
Alloway v. Braine . . .	468	284, 359	
— v. Steere . . .	658	Assignees of Brewster and	
Alsager v. Currie . . .	656	West, Ex parte . . .	689
— v. Rowley . . .	611, 613	Astle v. Wright . . .	66, 68, 69
Alston, Ex parte . . .	661, 718	Astley v. Johnson . . .	268*
Ambler v. Bolton . . .	331, 415, 558	Athenæum Life Ins. Soc. v. .	
Ambrose v. Kerrison . . .	373	Pooley . . .	191
Anderson's Case (7 Ch. D.) . .	63	Athenæum Soc., Re . . .	201
Anderson, Ex parte (5 Ch.) . .	649	Atkins, Ex parte . . .	725
— (14 Q. B. D.) . . .	703	— v. Tredgold . . .	262
— v. Anderson . . .	425, 466, 582	Atkinson v. Laing . . .	286
— v. Maltby 338, 486, 574, 653, 698		— v. Mackreth . . .	151, 284
— v. Wallace . . .	544	Atkyns v. Kinnier . . .	438, 455
— v. Weston . . .	214	Attwood v. Banks . . .	636
Andrews, Ex parte . . .	722, 738, 740	— v. Munnings . . .	130
Andrews and Alexander's		— v. Rattenbury . . .	274
Case . . .	51	Attwool v. Attwool . . .	290
Andrewes v. Garstin . . .	559	Atwood v. Maude . . .	68, 69
Anglesea Colliery Co. . .	403	Aubert v. Maze 94, 97, 105, 378, 388	
Anon. (1 Camp. 492) . . .	425	Aubin v. Holt . . .	93, 100, 479
— (2 K. & J. 441) . . .	539, 544, 577,	Auld v. Glasgow Working	
578, 579, 581		Men's Building Soc. . .	310
— (1 Madd. 144) . . .	514	Ault v. Goodrich . . .	220,* 260, 511
— (1 Mod. 215) . . .	654	Aulton v. Atkins . . .	450
— (12 Mod. 446) . . .	675	Aunand v. Honiwood . . .	342
— (3 Salk. 61, and 12 Mod.		Austen, Ex parte . . .	171, 703
446) . . .	647	— v. Boys . . .	435, 438, 445, 447*
— v. Layfield . . .	136	Austin v. Jackson . . .	402, 518
Ansell v. Baker . . .	255, 256	Aveling v. Knipe . . .	51
— v. Waterhouse . . .	283	Averall v. Wade . . .	369
Antram v. Chace . . .	129	Avery v. Langford . . .	437, 455
Apperley v. Page . . .	463, 499, 500	Baboo Janokey Doss v. Bind-	
Appleby, Ex parte . . .	702, 705, 706	abun Doss . . .	460
Appleton v. Binks . . .	177	Backhouse v. Charlton . .	133, 135
Apsey, Ex parte . . .	160,* 191	— v. Hall . . .	118, 119
Arbouin, Ex parte 679, 686, 702, 746		Backhurst v. Clinkard . .	357
Arbuckle v. Taylor . . .	150	Backwell v. Child . . .	620
Arden v. Sharpe . . .	171	Badeley v. Consolidated Bank .	36,
— v. Tucker . . .	276	37, 38,* 255, and Add. to p. 38	
Arkwright v. Newbold . . .	163, 481	Badger v. Shaw . . .	679
Arlington v. Meyrick . . .	117	Baglehole, Ex parte . . .	73
Armitage v. Winterbottom . .	139	Bagot v. Easton . . .	491, 501
Armory v. Delamirie . . .	148	Bagshaw v. Parker . . .	572, 579
Armstrong v. Armstrong . .	91, 105,	Bailey, Ex parte . . .	627
106		— v. Bidwell . . .	169
— v. Lewis . . .	99	— v. Finch . . .	659
Arnold v. Bainbridge . . .	293	— v. Ford . . .	559, 577
Arnott v. Hayes . . .	537	— v. Johnson . . .	643, 657
Arthur v. Lamb . . .	59, 60	Baillie v. Goodwin . . .	266
Arton v. Booth . . .	145*	Baird's Case . . .	124, 212
Ashby v. James . . .	510	Baird v. Planque . . .	43
Ashley's Case . . .	490	Baker's Case . . .	76
Ashton v. Blackshaw . . .	679	Baker v. Charlton . . .	184*
Ashurst v. Mason . . .	369, 377, 379	— v. Martin . . .	612
Ashworth v. Munn . . .	348		

Baldney v. Ritchie . . . . .	281	Barry, Ex parte . . . . .	678
Bale v. Cleland . . . . .	482	— v. Nesham . . . . .	23
Ball, Ex parte . . . . .	740*	— v. Stevens . . . . .	458
— v. Dunsterville . . . . .	137	Barter, Ex parte . . . . .	651, 653
— v. Lanesborough . . . . .	190	Bartlett v. Vinor . . . . .	95
Ballam v. Price . . . . .	224, 237	Barton v. Hanson . . . . .	179, 203, 328
Balmain v. Shore . . . . .	328, 347, 434	— v. Williams . . . . .	61, 124, 140, 562, 568*
Balsh v. Hyham . . . . .	371, 374	Barwick v. English Joint- Stock Bank . . . . .	163
Bamford, Ex parte . . . . .	633	Bass v. Clive . . . . .	112
Banco de Portugal v. Waddell . . . . .	719, 749	Bassaro, Ex parte . . . . .	645
Bank of Australia v. Nias . . . . .	255	Bassett v. Wood . . . . .	255
Bank of England, Case of . . . . .	329, 330,* 337, 385	Batard v. Douglas . . . . .	24
— v. Anderson . . . . .	96	— v. Hawes . . . . .	24, 376, 566
— v. Booth . . . . .	96	Bate, Ex parte . . . . .	256, 704, 750, 754
Bank of Ireland v. Perry . . . . .	713	Bateman v. Pinder . . . . .	261
Bank of Scotland v. Christie . . . . .	119, 230	Bates, Ex parte . . . . .	75
Bankhead's Trusts . . . . .	683	Baeston, Ex parte . . . . .	641
Banks, Ex parte . . . . .	743, 744	— v. Gosling . . . . .	237
— v. Gibson . . . . .	445, 446, 544	Bath, Ex parte . . . . .	719
Bannatyne v. Leader . . . . .	630	Batson, Ex parte (1 Gl. & J.) . . . . .	645
Banner, Ex parte . . . . .	704	— (Cooke's B. L.) . . . . .	678
— v. Berridge . . . . .	260, 511	Batte v. Robins . . . . .	390
— v. Johnston . . . . .	711	Battersby v. Smyth . . . . .	324
Barber, Re or Ex parte . . . . .	402, 409, 421, 422, 429, 430, 432	Battley v. Lewis . . . . .	22, 202, 413
— v. Barber . . . . .	509	Battie v. M'Cundie . . . . .	103
— v. Mackrell . . . . .	601	Baudier, Ex parte . . . . .	729
Barclay, Ex parte . . . . .	733	Bauerman, Ex parte . . . . .	731, 732
— v. Lucas . . . . .	117	Bawden v. Howell . . . . .	274
Barden v. Keverberg . . . . .	77	Baxter v. Brown . . . . .	348
Barff, Ex parte . . . . .	651	— v. Hozier . . . . .	560
Barfield v. Loughborough . . . . .	390	— v. The Earl of Ports- mouth . . . . .	76, 213
Barfoot v. Goodall . . . . .	223	— v. Pritchard . . . . .	629
Baring v. Corrie . . . . .	295	— v. West . . . . .	81, 85, 89, 581
— v. Dix . . . . .	576*	Bayley, Ex parte . . . . .	66
— v. Stanton . . . . .	307	Bayly v. Schofield . . . . .	425
Barker v. Allan . . . . .	563	Baynard v. Woolley . . . . .	377, 379
— v. Goodair . . . . .	359, 671, 675	Beak v. Beak . . . . .	519, 520
— v. Richardson . . . . .	145, 146*	Beale, Re . . . . .	640
Barklie v. Scott . . . . .	12*	— v. Caddick . . . . .	135, 209, 228, 230, 234
Barnard, Re . . . . .	186, 193, 598	— v. Mouis . . . . .	206,* 207
Barnardiston v. Chapman . . . . .	562	Beamish v. Beamish . . . . .	435
Barnett, Ex parte (9 Ch.) . . . . .	658	Bear v. Bromley . . . . .	50
— (De G.) . . . . .	715	Beard v. Webb . . . . .	77
— v. Lambert . . . . .	23	Beasley v. Beasley . . . . .	632
Barnett, Hoares & Co. v. South London Tramway Co. . . . .	163	Beaumont v. Boultonbee . . . . .	513
Barnewall, Ex parte . . . . .	161, 162, 617, 702, 745	— v. Greathead . . . . .	224
Baroness Wenlock v. River Dee Co. . . . .	191	— v. Grover . . . . .	493
Barron v. Fitzgerald . . . . .	113, 114	— v. Meredith . . . . .	5, 50
Barrow, Ex parte . . . . .	48,* 337, 460, 493, 688	Beavan v. M'Donnell . . . . .	76
Barr's Trust, Re . . . . .	680	Beck v. Kantorowicz . . . . .	464, 480, 496
		Beckford v. Wade . . . . .	260
		Beckham v. Drake . . . . .	144, 147, 178,* 189, 192, 275, 281, 652
		— v. Knight . . . . .	178, 281
		Bedford v. Bagshaw . . . . .	482

Bedford v. Brutton	457, 563, 565, 567	Bigg, Ex parte	747
— v. Deakin	244,* 247, 253, 254	Biggs v. Lawrence	93, 103, 268
Beech v. Eyre	207	Bignold, Ex parte	390
Beecham v. Smith	116, 565, 568	— v. Waterhouse	141, 143,* 172*
Beecher v. Guilburn	391	Bilborough v. Holmes	250, 251, 252, 706, 707
Beer v. Beer	560	Billiter v. Young	338, 486, 574, 653
Belcher v. Prittie	630	Binford v. Dommett	348
— v. Sykes (8 B. & C.)	337, 449	Bingham, Ex parte	203, 706
— v. Sykes (6 B. & C.)	450	Binney v. Mutrie	402, 403, 421, 517
Beldon v. Campbell	133	Birch, Ex parte	573
Bell, Ex parte	97, 268,* 270	Birley, Ex parte	732, 733
— v. Banks	257	— v. Kennedy	505
— v. Morrison	261	Birmingham Land Co. v. L. & N. W. Rail. Co.	265
— v. Phyn	343,* 346, 347	Bischoffsheim, Ex parte	754
— v. Reid	73	Bishop, Ex parte	719
— v. Simpson	629	— v. Church	194,* 195, 596
Bellairs v. Ebsworth	118	— v. The Countess of Jersey	153, 158*
— v. Tucker	481, 482	Bittlestone v. Cooke	629
Bellamy and Metropolitan Board of Works, Re	151	Blackburn, Ex parte	630
Belshaw v. Bush	226	Blackburn Building Soc. v. Cunliffe, Brookes & Co.	132, 191
Belton v. Hodges	75	Blackburn, Low & Co. v. Vigors	141, and Add. to p. 141
Benfield, Ex parte	637	Blackett v. Weir	86
Benham v. Gray	328, 562	Blades v. Free	211
Beningfield v. Baxter	475, 488, 517, 613, 614	Blain, Ex parte	265, 300, 624, 625, 633
Benjamin v. Porteus	29*	— v. Agar	492
Bennett v. Blain	348	Blair v. Bromley	146, 153,* 162, 163, 260, 596
— v. Lytton	594	Blake, Ex parte	729
Benson, Ex parte	702	— v. Shaw	439, 443, 447
— v. Hadfield	241, 284	Blakeley's (Executor's) Case	212
— v. Heathorn	309	Blakeney v. Dufaur	551, 553
Bentham Mills Spinning Co., Re	652	Bland, Ex parte	627
Bentley, Ex parte	746	Blannin v. Taylor	718
— v. Bates	55, 56, 333, 366, 493, 498, 650	Bleaden v. Hancock	279
— v. Craven	305,* 380	Bleckley, Re	373
Beresford v. Browning	194,* 197, 596	— v. Rymer	508
Bergmann v. Macmillan	364, 461	Blew v. Wyatt	246,* 253
Bernasconi v. Fairbrother	638	Blisset v. Daniel	304, 315, 402, 407, 408, 421, 426,* 427, 430, 487, 493, 517, 540, 571, 675
Berney v. Davison	630, 631	Bloxam v. Metropolitan Railway Co.	394
— v. Vyrer	630, 631	Bloxham, Ex parte	715
Berry, Ex parte	709	— v. Pell	16, 27,* 28, 29, 80
— v. Alderman	169	Bluck v. Capstick	68
Besch v. Frolich	579, 583	Blundell v. Winsor	240
Besley's Case, or Besley, Ex parte	24	Blyth v. Lafone	452
Betts v. Gibbins	370, 377, 378	Blythe, Ex parte	722
Bevan, Ex parte	743, 744	Boardman, Ex parte	730
— v. Attorney-General	619	Boast v. Firth	419
— v. Lewis	190,* 359, 461, 542	Bock v. Gorrissen	656
— v. Nunn	631, 665		
Beveridge v. Beveridge	315		
Biddlecombe v. Bond	425		
Biddulph, Ex parte	153,* 717		
Bielby, Ex parte	746		

Boddam v. Ryley . . . . .	392, 405	Bowyear v. Pawson . . . . .	293
Boddington v. Castelli . . . . .	290, 653	Boyce v. Douglas . . . . .	256
Bodenham v. Purchas . . . . .	230	— v. Green . . . . .	348
Bolckow v. Fisher . . . . .	503	Boyd v. Emerson . . . . .	129
Bolitho, Ex parte . . . . .	186, 703	— v. Mangles . . . . .	659
Bolland, Ex parte (Mont. & McAr.) . . . . .	155	Boydell v. Drummond . . . . .	222
— (7 Ch.) . . . . .	629, 630	— v. McMichael . . . . .	678
— (8 Ch. D.) . . . . .	628, 659	Boyes v. Bluck . . . . .	238
— v. Nash . . . . .	657,* 662	Boyle, Ex parte . . . . .	657
Bolton, Ex parte . . . . .	746, 747	Boys, Re . . . . .	235
— v. Puller 335,* 646, 647, 698		Bradbury, Ex parte . . . . .	707
Bonbonus, Ex parte 131, 140, 171, 189, 703		— v. Dickens . . . . .	440, 443, 541
Bond, Ex parte . . . . .	743, 744, 746	Bradley v. Millar . . . . .	603, 743, 746
— v. Gibson . . . . .	144,* 169*	Bradshaw, Ex parte . . . . .	731
— v. Milbourn . . . . .	65	Braggiotti, Ex parte . . . . .	753
— v. Pittard . . . . .	15	Braham v. Beachim . . . . .	114
Bone v. Pollard . . . . .	51, 323	Braithwaite v. Britain . . . . .	250, 253, 260, 262, 596, 597, 613
Bonfield v. Smith . . . . .	192, 280, 281, 295, 296	— v. Skafield . . . . .	45
Bonnardet v. Taylor . . . . .	505	Brand v. Boulcott . . . . .	277
Bonser v. Cox . . . . .	602	Brandao v. Barnett . . . . .	656
Bonville v. Bonville . . . . .	479	Brandon v. Hubbard . . . . .	277
Booth v. Bank of England . . . . .	96	— v. Scott . . . . .	268, 269
— v. Booth . . . . .	617	Brazier v. Hudson . . . . .	134, 234, 342
— v. Hodgson . . . . .	97, 105	Bray v. Fromont . . . . .	363, 460, 493
— v. Leicester . . . . .	389	Bree v. Holbech . . . . .	259
— v. Parkes 122, 410, 521, 522, 527, 528, 616		Brenmer v. Chamberlayne . . . . .	206
Borries v. Imperial Ottoman Bank . . . . .	295	Brett's Case, or Ex parte (6 Ch. and 8 Ch.) . . . . .	715, 717
Borrodailles, Ex parte . . . . .	746	Brett v. Beckwith 11,* 91, 98, 103, 178, 192, 596, 600,* 688, 691	
Bosanquet v. Woodford . . . . .	267	— v. Marsh . . . . .	228
— v. Wray 116, 267, 568, 569		Brettel v. Williams . . . . .	126, 138*
Boswell v. Smith . . . . .	292	Brewer v. Pocock . . . . .	594
Bottomley v. Fisher . . . . .	188*	Brewin v. Short . . . . .	681, 682
— v. Nuttall 178, 180, 254, 257, 704, 718		Brewster and West (Assignees of), Ex parte . . . . .	689
Bouch v. Sproule . . . . .	321, 621	Brice's Case . . . . .	211
Boulter v. Peplow . . . . .	566	Brickland v. Newsome . . . . .	624
Boulton, Ex parte . . . . .	680	Brickwood v. Miller . . . . .	676
— v. Jones . . . . .	186, 286	Bridges v. Mitchell . . . . .	508
Bourdillon v. Roche . . . . .	151	Brierley v. Cripps . . . . .	564
Bourdin v. Greenwood . . . . .	260	Brigg's Case (1 Eq.) . . . . .	490
Bourne, Ex parte . . . . .	636	Briggs, Ex parte (3 D. & Ch.) . . . . .	16
— v. Freeth . . . . .	44,* 89	Bright, Ex parte . . . . .	683
Boussmaker, Ex parte . . . . .	72	— v. Hutton . . . . .	24
Bovill v. Cowan . . . . .	503	Brinsmead v. Harrison . . . . .	256
— v. Hammond . . . . .	566, 567	Bristol, Corporation of, v. Westcott . . . . .	336
— v. Wood . . . . .	718	Bristow v. James . . . . .	280
Bowden, Ex parte . . . . .	716	— v. Maxwell . . . . .	261
Bower v. Marris . . . . .	228	— v. Taylor . . . . .	134
— v. Swadlin . . . . .	237	— v. Whitmore . . . . .	355
Bowes, Re . . . . .	656	Britain v. Rossiter . . . . .	81
— v. Lucas . . . . .	228	British and American Telegraph Co. v. Albion Bank . . . . .	149
— v. City of Toronto . . . . .	524	British Linen Co. v. Drummond . . . . .	259
Bowker v. Burdekin . . . . .	137, 631		
Bowsher v. Watkins . . . . .	487, 613		

British Mutual Bank Co. v. Charnwood Forest Rail. Co.	163	Browne v. Savage . . .	680
— Wagon Co. v. Lea . . .	287	Brownell v. Brownell . . .	513
Broad, Re . . .	710	Browning v. Browning . . .	406, 430
Broadbent, Ex parte . . .	650	Brownlie v. Russell . . .	12
Brockbank v. Anderson . . .	88*	Brownrigg v. Rae . . .	140, 269
Broderick, Ex parte . . .	715	Brunswick v. Slowman . . .	149
Brodie v. Howard . . .	147	Brutton v. Burton . . .	112, 137, 272
Bromley v. Williams . . .	51, 98, 464, 495	Bryant v. Herbert . . .	199
Brooke, Ex parte . . .	708	Brydges v. Branfill . . .	151,* 162, 200
— v. Enderby . . .	229	Bryon v. The Metropolitan Saloon Omnibus Co. . .	133
— v. Garrod . . .	424, 433	Buchanan v. Findlay . . .	656
Brooks, Ex parte . . .	677	Buck, Ex parte . . .	683
— v. Sutton . . .	516	Buckingham, Ex parte . . .	731
Broom v. Broom . . .	344*	Buckland v. Johnson . . .	256
Broome, Ex parte . . .	42, 65, 482, 491, 551, 739*	— v. Newsame . . .	624, 634
Brophy v. Holmes . . .	64	Buckley, Ex parte . . .	189,* 192, 702
Broughton v. Broughton . . .	268, 270	— v. Barber . . .	146, 288, 342,* 568, 569, 672
— v. Manchester and Salford Water-works Co. . .	96	Buddle v. Willson . . .	280
Brown, Ex parte (1 Atk.) . . .	721	Bugg's Case . . .	584
— (1 V. & B. and 1 Ro.) . . .	639, 747	Bull v. O'Sullivan . . .	133
— (3 M. & A.) . . .	653, 683	Bullen v. Sharp . . .	32,* 34, 171
— (2 M. D. & D.) . . .	724*	Bullock v. Caird . . .	265
— (3 De G. & S.) . . .	740	— v. Chapman . . .	446, 544
— (9 Ch. D.) . . .	651, 687	— v. Crockett . . .	69
— v. Adams . . .	162, 228	— v. Dodds . . .	73
— v. Boorman . . .	199	Bunn v. Guy . . .	93
— v. Brown . . .	88	Burbidge v. Robinson . . .	504
— v. Byers . . .	130, 133	Burbridge, Ex parte . . .	680, 683
— v. Carbery . . .	646	Burdekin, Ex parte (1 Deac.) . . .	641
— v. Dale . . .	342	— (2 M. D. & D.) . . .	732
— v. De Tastet . . .	364, 381, 460, 403, 519, 524, 527,* 528, 616	Burden v. Burden . . .	381, 382, 528
— v. Douglas . . .	603,* 604	Burdikin, Ex parte . . .	639, 640, 642
— Duncan . . .	95,* 99	Burdon v. Barkus . . .	66, 81, 121, 326, 328, 330, 384,* 385, 555, 557
— v. Gellatly . . .	592	Burfield v. Rouch . . .	447
— v. Gordon . . .	211, 250, 251, 252,* 254, 260, 262, 597	Burgess v. Burgess . . .	114
— v. Hall . . .	370	— v. Merrill . . .	74, 281
— v. Jodrell . . .	76	Burgue v. De Tastet . . .	90
— v. Kidger . . .	130, 131	Burland v. Nash . . .	228, 231*
— v. Leonard . . .	41, 175, 214, 217*	Burls v. Smith . . .	45, 50, 51
— v. Litton . . .	526	Burlton, Ex parte . . .	641
— v. Oakshot . . .	332*	— v. Wall . . .	641
— v. Perkins . . .	515, 516,* 538	Burmester v. Norris . . .	132, 133, 190
— v. Tapscott . . .	15, 563, 564, 566	Burn, Ex parte . . .	678
— v. Vidler . . .	526	— v. Burn . . .	137, 194, 195,* 596, 598
— v. Weatherby . . .	604	— v. Carvalho . . .	652, 681
— v. Wooton . . .	256	Burnaby, Ex parte . . .	694
—, Shipley & Co. v. Kough . . .	711	Burnand v. Rodocanachi . . .	325
Browne, Ex parte (1 Rose) . . .	636	Burnell v. Hunt . . .	22,* 28, 328, 358
— (6 Ves.) . . .	681	Burnett, Ex parte . . .	731
— v. Collins . . .	394, 620, 621	Burns v. Poulson . . .	148
— v. Gibbins . . .	386	Burnside v. Dayrell . . .	85
— v. Monmouthshire Railway and Canal Co. . .	393	Burrell, Ex parte . . .	721
		Burroughs v. Elton . . .	613
		Burstall v. Beyfus . . .	501
		Burt v. Moulton . . .	667

Burton, Ex parte (1 Gl. & J.)	680, 685*	Carpenter v. Marnell	653
— (3 M. D. & D.)	161, 162, 702, 717	Carr v. L. & N. W. Railway Co.	40
— (13 Ch. D.)	628	— v. Smith	565
— v. Green	356	Carralli and Haggard's Claim	657
— v. Issitt	215*	Carrick, Ex parte	653
— v. Wigley	454	Carrington v. Cantillon	272
— v. Wookey	309*	Carruthers v. Sheddon	112
Bury v. Allen	65, 66, 68, 69, 367, 387, 492, 519, 739	Carter, Ex parte (2 Gl. & J.)	737, 742
— v. Bedford	447	— (1 M. & A.)	753
Bush v. Martin	260	— v. Horne	59, 307*
Bushell, Ex parte	169, 172, 702	— v. Southall	273
Butchart v. Dresser	140, 218, 219, 230*	— v. Whalley	44, 212, * 214
Butcher, Ex parte	688, 699	Caruthers, Ex parte	729
— v. Pooler	518	Carver v. Pinto Leite	508
— v. Stead	630	Cassels v. Stewart	303, 313, * 364, 423*
Butler v. Butler	78	Castell, Ex parte	726, 736
Butlin, Ex parte	746	Castelli v. Boddington	289, 653
Butt v. Bilke	642	Catling v. Skoulding	509
— v. Monteaux	107, 463	Catskill Bank v. Gray	79
Butterfield, Ex parte	608, 722*	Catt v. Howard	128
Buxton v. Lister	476	Caughey, Ex parte	639
Byers v. Dobey	280	Cavander v. Bulteel	353, 364
Bygrave, Ex parte	641	Cavendish v. Geaves	293, 296*
Cabell v. Vaughan	273, 280, 282	Cawthorn v. Chalie	460, 591
Caddick v. Skidmore	82*	Cawthron v. Trickett	277
Cahen, Ex parte	624	Cefn Cilcen Mining Co.	132
Caldecott, Re	739	Central Railway of Venezuela v. Kisch	480
Calder v. Dobell	177	Cesena Sulphur Co. v. Nicholson	394
— v. Rutherford	288	Chambers, Ex parte (2 M. & A.)	637, 638
Caldicott, Ex parte	716	— (3 M. & A.)	639
— v. Griffiths	50, 567	— v. Howell	488
Caledonian Lodge of Freemasons	50	Chancellor, Re	615, 620
Calthrop, Re	633	Chancey v. May	464
Calton v. Bragg	389	Chandler, Ex parte (9 Ves.)	733
Cambefort v. Chapman	255, 256, and Add. to p. 193	— (13 Q. B. D.)	745, 747
Camden v. Anderson	324	— v. Danks	281
Cameron, Re	610, 620	— v. Dorsett	304, 486*
Campanari v. Woodburn	211	— v. Parkes	74
Campbell v. Campbell	378, * 388	Chapleo v. Brunswick Build. Soc.	45
— v. Flemings	490	Chapman v. Beach	552
— v. Mullett	54, 325, 335	— v. Beckington	118
Candler v. Candler	100, 549	— v. Derby	654
Cannan v. South East Railway Co.	665	— v. Koops	357
Capper's Case	24	Chaplin, Ex parte	631
Carew's Case	369, 386	Chapple v. Cadell	407, * 497*
Carlisle Canal Co., Ex parte	702	Charles v. Branker	90
Carmichael v. Carmichael	512	Charlton v. Poulter	404, 542, 580
Carne, Ex parte	719, 745	Chase v. Cox	227
— v. Legh	282	Chavany v. Van Sommer	571
Carpenter, Ex parte	573, 698, 741, 752	Chavasse, Ex parte	92
		Cheap v. Cramond	28, 36
		Cheeseman v. Price	581

Cheetham v. Crook	292, 294, 596	Clegg v. Fishwick	303, 307,* 496,
— v. Ward	224, 237		552, 611
Child v. Morley	370, 371, 373	Clements v. Bowes	463, 491, 499,
— v. Stenning	501		500, 512
Child, Re	691	— v. Hall	303, 307, 472, 473,*
Chippendale, Ex parte	126, 191,		475, 527, 528
	374, 382, 389, 390	— v. Norris	309, 314, 315, 412,
Chissum v. Dewes	439		540*
Cholmondeley v. Clinton	439	Clemontson v. Blessig	72
Christian v. Taylor	502*	Clifford v. Brooke	458, 482, 492
Christie, Ex parte (M. & Bl.)	256,	Clive v. Clive	621
	636, 701, 703, 704	Clough, Re	140, 218, 219, 341
— (10 Ves.)	661	— v. London & Northwest-	
— (3 M. D. & D.)	189, 702	ern Railway Co.	490
— v. Commissioners of In-		Clowes, Ex parte	160, 208, 706,
land Revenue	450		721
Christophers v. White	268	Coates v. Coates	478
Chuck, Ex parte	13, 28, 328, 690,	Cobham, Ex parte	729
	732	Coburn v. Collins	593
— v. Freen	119	Cockburn v. Thompson	463, 463
Churton v. Douglas	437, 440, 441,*	Cockerell v. Aucomte	50, 51
	445, 543	— v. Barber	381
City Bank v. Luckie	712, 714	Cockle v. Whiting	339, 485
City Discount Co. v. Maclean	230,	Cockrill v. Sparkes	263
	235	Cocks v. Nash	224, 337
City of London Gas Co. v.		Coffee v. Brian	566
Nicholls	144, 178	Coffton v. Horner	466, 543
Clancarty v. Latouche	513	Cohen, Ex parte	627
Clark, Re (3 D. & R.)	100	Colbeck, Re	28, 641, 642
— (De Gex)	189, 192, 702	Colburn v. Patmore	377
— v. Alexander	510	Coldwell v. Gregory	689*
— v. Cort	291	Colegrave v. Manley	439
— v. Cullen	300	Coleman, Ex parte	641
— v. Leach	411, 429	— v. Riches	148
Clarke, Ex parte (4 Ves.)	730	— v. Mellersh	513
— (1 D. & C.)	637	Colemere, Re	629
— v. Bickers	196,* 595	Coles v. Gurney	272
— v. Blackstock	187	— v. Sims	455
— v. Clement	298	Collen v. Wright	163, 168
— v. Dickson	481, 482, 490	Collett v. Foster	148
— v. Hart	428, 472, 574	Colley v. Smith	567
— v. Lord Abingdon	455	Collinge, Ex parte	692, 737
— v. Tipping	513	Collingwood v. Berkeley	42, 45
Clarkes, Re	256, 704	Collins, Ex parte	633
Clarkson, Ex parte	334, 335, 336,	— v. Blantern	106, 370
	698, 699*	— v. Carey	268
— v. Edge	438, 455	— v. Collins	433
Clavering v. Westley	596	— v. Evans	370
Claxton, Ex parte	636, 643	— v. Forbes	683
— v. Kynaston	237	— v. Jackson	321,* 414
Clay, Ex parte (6 Ves.)	730	— v. Prosser	238
— (1 Mont. Part.)	733	— v. Young	548
— v. Langslow	87, 89	Collinson v. Lister	141
Clayton's Case	199, 226,* 228,* 229,	Collyer v. Isaacs	708
	230, 236, 250, 253	Colonial Bank v. Whinney	680
Cleather v. Twisden	151, 156*	Colquhoun v. Brooks	394
Clegg v. Clegg	57, 59, 310, 323	Colson v. Selby	281
— v. Edmondson	308,* 469,* 470,	Columbian Government v.	
	473, 475, 508, 571	Rothschild	501



Colyear v. Countess of Mulgrave . . . . .	434	Cossart, Ex parte . . . . .	752
Combe's Case . . . . .	177	Costeker v. Horrox . . . . .	505, 506
Commercial Bank Corp. of India and the East . . . . .	248	Cothay v. Fennell . . . . .	276, 277
Connell, Ex parte . . . . .	324, 716, 740	Cottam v. Partridge . . . . .	259, 510
Const v. Harris . . . . .	304, 314, 315, 316,* 319,* 409, 410, 544, 545,* 551	Cotton, Ex parte . . . . .	678
Cooch v. Goodman . . . . .	115	Couldery v. Bartrum . . . . .	714, 746
Cook, Ex parte (2 P. W.) . . . . .	646, 692*	Coulson, Ex parte, . . . . .	624
— (Mont.) . . . . .	726*	and Add. to pp. 78 and 626	
— v. Catchpole . . . . .	453	Courtenay v. Wagstaff . . . . .	21
— v. Collingridge, 429, 488, 489, 517, 519, 528,* 555,* 557, 573, 617, 619* . . . . .		Courtivron v. Meunier . . . . .	753
— v. Rhodes . . . . .	438	Cousins v. Smith . . . . .	104
Cooke v. Batchellor . . . . .	278	Coventry v. Barclay . . . . .	409, 421,* 429, 430, 432
— v. Benbow . . . . .	389, 391, 417,* 418	Cowell v. Edwards . . . . .	376
— v. Cooke . . . . .	452	— v. Sikes . . . . .	598, 599
— v. Eshelby . . . . .	295	— v. Watts . . . . .	82, 83, 468*
— v. Seeley . . . . .	276*	Cowslad v. Cely . . . . .	283
Cookson v. Cookson . . . . .	343,* 346, 347	Cox's Trusts, Re . . . . .	621
Coomer v. Bromley . . . . .	153, 156, 159*	Cox v. Hickman . . . . .	26, 30,* 31,* 33, 35, 36, 39, 126
Coope v. Eyre . . . . .	15,* 18, 53*	— v. Hubbard . . . . .	276
Cooper, Ex parte (1 M. D. & D.) . . . . .	334, 337, 687,* 699, 700	— v. Stephens . . . . .	460
— (2 M. D. & D.) . . . . .	740	— v. Willoughby . . . . .	411
— (10 Ch.) . . . . .	628	Cradock v. Piper . . . . .	268
— v. Chitty . . . . .	675	Cragg v. Ford . . . . .	387,* 388*
— v. Hood . . . . .	479	Cragoe v. Jones . . . . .	239
— v. Met. Board of Works . . . . .	439	Cramer v. Bird . . . . .	463
— v. Pritchard . . . . .	752	Craven, Ex parte . . . . .	629, 630
— v. Wandsworth Board of Works . . . . .	427	— v. Edmondson . . . . .	668*
— v. Watlington . . . . .	442	— v. Widdows . . . . .	729
— v. Watson . . . . .	442*	Crawford v. Hamilton . . . . .	363, 583, 590
— v. Webb . . . . .	463, 499	— v. Stirling . . . . .	138
Cope v. Rowlands . . . . .	95, 97	Crawshay v. Collins . . . . .	218, 323, 340, 381, 402, 410, 517, 519, 520, 523, 526,* 555, 574, 588, 592, 647, 648, 649
Copeland, Ex parte . . . . .	140, 687	— v. Maule . . . . .	55, 56, 57, 121,* 122, 218, 331, 333,* 363, 366, 555, 557, 558, 559, 571, 583, 587, 590
Copeman v. Gallant . . . . .	687	Creak v. Capell . . . . .	506
Copland, Ex parte . . . . .	729	Crellin v. Brook . . . . .	125
— v. Toulmin . . . . .	223, 230, 234, 349, 350	Cresswell v. Hedges . . . . .	59
Coplestone, Ex parte . . . . .	718	Creuze v. Hunter . . . . .	389
Coppard v. Allen . . . . .	284	Crew, Ex parte . . . . .	639, 640
Corbett, Ex parte . . . . .	111, 748	Cridland, Ex parte . . . . .	640, 642
Corbridge, Ex parte . . . . .	37, 722	Crispin, Ex parte . . . . .	624
Corcoran v. Witt . . . . .	453	Croft v. Allison . . . . .	148
Cork & Brandon Railway Co. v. Cazenove . . . . .	76	— v. Pike . . . . .	339, 354, 599
Cork & Youghal Railway Co. . . . .	191	Crofts, Ex parte . . . . .	723, 734
Cornelius v. Harrison . . . . .	43	Cropper v. Knapman . . . . .	613
Cornill v. Hudson . . . . .	258	Crosbie v. Guion . . . . .	590
Corpe v. Overton . . . . .	75	Crosby v. Crouch . . . . .	630
Corporation of Bristol v. Westcott . . . . .	336	Crosfield, Ex parte . . . . .	731
Corry v. Londonderry & Enniskillen Railway Co. . . . .	393	Cross v. Cheshire . . . . .	564
Corsellis, Re . . . . .	268	— v. Williams . . . . .	50
		Crosse v. Smith . . . . .	224
		Crossfield v. Such . . . . .	51
		Crossman v. The Queen . . . . .	594

Crowder, Ex parte . . . . .	692	Davison, Re 256, 257, 704, 745, 747	
Croxton's Case . . . . .	382, 386	— v. Donaldson . . . . .	249
Cruikshank v. McVicar . . . . .	377, 480, 492, 520*	— v. Farmer . . . . .	637
Cruse v. Paine . . . . .	375	— v. Gillies . . . . .	394
Cruttwell v. Lye . . . . .	440	— v. Robertson . . . . .	180, 184
Cubitt v. Porter . . . . .	562	Davys v. Douglas . . . . .	101
Cuff v. Murtagh . . . . .	122	Dawe v. Vergara . . . . .	625
Cullen v. Thompson's Trust-ees and Kerr . . . . .	482	Dawkins v. Antrobus . . . . .	466
Cumberledge v. Lawson . . . . .	137	Dawson, Ex parte . . . . .	645
Cummins v. Cummins . . . . .	240	— v. Beeson . . . . .	437, 440
Currie, Ex parte . . . . .	753	— v. Dawson . . . . .	514
Curry, Re . . . . .	690	— v. Fitzgerald . . . . .	452
Curtis' Case . . . . .	75	Dean v. Allen . . . . .	594
Curtis v. Barclay . . . . .	370, 372	— v. Macdowell . . . . .	312, 419
— v. Perry . . . . .	324	— v. Newhall . . . . .	225, 237
Cust, Ex parte . . . . .	734	— v. Wilson . . . . .	558
Custance v. Bradshaw . . . . .	348	Dear, Ex parte . . . . .	699
Cutbush v. Cutbush . . . . .	609	Deare v. Soutten . . . . .	191
Cutten, Ex parte . . . . .	640, 642	De Begnis v. Armistead . . . . .	101, 105*
— v. Sanger . . . . .	425	De Berenger v. Hamel . . . . .	581
Dacie v. John . . . . .	554*	De Berkomp v. Smith . . . . .	40, 49, 88
Dadswell v. Jacobs . . . . .	504	De Bussche v. Alt . . . . .	306, 307, 467
Daintry, Re . . . . .	645	Deeks v. Stanhope . . . . .	460, 461, 499
Dale v. Hamilton . . . . .	63, 81,* 82, 85, 129, 304, 434, 477*	Deeze, Ex parte . . . . .	655, 658
Dally v. Wolferston . . . . .	752	Defries v. Creed . . . . .	554
Dance v. Girdler . . . . .	118	De Gendre v. Kent . . . . .	621
Daniel v. Cross . . . . .	247, 251, 596	De la Rosa v. Prieto . . . . .	99
Daniell v. Roy. Brit. Bank . . . . .	491	De la Rue v. Dickinson . . . . .	508
— v. Sinclair . . . . .	514	Delauney v. Strickland . . . . .	50, 51
Dann, Ex parte . . . . .	629	Delhasse, Ex parte . . . . .	11, 35, 38*
Darby v. Boucher . . . . .	191	Delorarine v. Browne . . . . .	475
— v. Darby . . . . .	340, 345,* 346	De Mattos v. Saunders . . . . .	654
Darwent v. Walton . . . . .	194, 283, 596	De Mautort v. Saunders . . . . .	192, 281, 295
Davenport, Ex parte . . . . .	716	De Mazar v. Pybus . . . . .	114
David v. Ellice . . . . .	242,* 243, 253	Dent v. London Tramway Co. . . . .	394
Davidson, Ex parte . . . . .	739, 740	— v. Turpin . . . . .	62
— v. Napier . . . . .	439, 542, 669,* 670	Denton v. Great Northern Railway Co. . . . .	482
— v. Tulloch . . . . .	482, 595	— v. Macneil . . . . .	490
Davies v. Davies (2 Keen) . . . . .	487,* 494, 613, 614	— v. Peters . . . . .	565
— v. Davies (36 Ch. D.) . . . . .	437, 442	— v. Rodie . . . . .	131, 390
— v. Games . . . . .	333	Denys v. Schuckburg . . . . .	55
— v. Hawkins . . . . .	316	De Ribeyre v. Barclay . . . . .	181, 153,* 160, 165
— v. Hodgson . . . . .	437, 440, 442, 444	Dering v. Winchelsea . . . . .	368, 376
— v. London & Prov. Marine Ins. Co. . . . .	480	Derry v. Mazarine . . . . .	77
— v. Makuna . . . . .	98, 99	De Tastet, Ex parte . . . . .	734
Davis' Case (12 Eq.) . . . . .	715	— v. Bordenave . . . . .	217, 541
Davis, Ex parte (4 De G. J. & S.) . . . . .	21, 727, 741	— v. Bordieu . . . . .	551
— v. Amer . . . . .	448, 479, 543, 550*	— v. Carroll . . . . .	145
— v. Fisk . . . . .	462	— v. Shaw . . . . .	111, 115, 568, 569
— v. Jones . . . . .	412	Deux v. Jefferies . . . . .	145
— v. Johnston . . . . .	60, 470	Devaynes v. Noble . . . . .	194, 517, 595, 596, 597, 601, 605*
— v. Morris . . . . .	300	Devaynes v. Noble —	
		— Baring's Case . . . . .	152,* 161, 165, 200, 596
		— Brice's Case . . . . .	211, 605

Devaynes v. Noble—		Dover v. Opey . . . . .	104
Clayton's Case . . . . .	152,* 250, 596, 597	Dowman v. Matthews . . . . .	294
Houlton's Case . . . . .	47, 211, 605	Downs v. Collins . . . . .	433, 434, 476, 479, 555, 573
John's Case . . . . .	211, 605	Drake v. Mitchell . . . . .	256, 704
Palmer's Case . . . . .	250, 596	— v. Symes . . . . .	502,* 503
Sleech's Case . . . . .	161, 194, 200, 250, 596, 597, 602	Draper v. Manchester & Sheffield Railway Co. . . . .	504
Warde's Case . . . . .	596	Drennen v. London Ass. Co. . . . .	20
Dever. Ex parte (No. 1) . . . . .	710, 711	Dresser v. Norwood . . . . .	141
— (No. 2) . . . . .	710, 711, 713	Drew v. Drew . . . . .	507
Dewdney, Ex parte . . . . .	633	— v. Nunn . . . . .	76, 213
Dewhurst, Ex parte (7 Ch.) . . . . .	639	Driver v. Burton . . . . .	274
— (8 Ch.) . . . . .	713	Drouet v. Taylor . . . . .	85
Dickenson v. Lockyer . . . . .	240	Drury v. Drury . . . . .	59
Dickin, Ex parte . . . . .	675	Dry v. Boswell . . . . .	12, 29*
Dickinson v. Valpy . . . . .	20, 42,* 85, 125, 127, 129, 130, 203	— v. Davey . . . . .	118
Dickson v. Cass . . . . .	663, 668	Dublin & Wicklow Railway Co. v. Black . . . . .	75
Digby, Ex parte . . . . .	28, 640, 641, 642	Dubois v. Ludert . . . . .	281, 295
Diggle v. Higgs . . . . .	106	Ducarry v. Gill . . . . .	180
Dimes v. Scott . . . . .	620	Duckworth, Re . . . . .	657
Dimsdale v. Robertson . . . . .	452	Dudgeon v. O'Connell . . . . .	135, 137
Dinham v. Bradford . . . . .	390, 433	Duff v. East India Co. . . . .	134
Dixon, Ex parte . . . . .	746	Duignan v. Walker . . . . .	437
— v. Clark . . . . .	226	Duke of Brunswick v. Sslowman . . . . .	149
— v. Cooper . . . . .	29	Duke of Northumberland v. Todd . . . . .	117
— v. Hammond . . . . .	288, 341	Duncan, Ex parte . . . . .	639, 642
— v. Holden . . . . .	544	— v. Chamberlayne . . . . .	680
— v. Wilkinson . . . . .	152	— v. Hill . . . . .	89
Dobbin v. Forster . . . . .	286	— v. Lowndes . . . . .	138, 179
Dobell v. Stevens . . . . .	481	— v. Luntley . . . . .	458, 492
Dobinson, Ex parte . . . . .	702	Dundonald v. Masterman . . . . .	151
Dobson, Ex parte . . . . .	631	Dunlop, Ex parte . . . . .	704
Docker v. Somes . . . . .	523, 536, 615, 617	Dunn v. Campbell . . . . .	505
Dockway v. Dickenson . . . . .	279	Dunne v. English . . . . .	306*
Doddington v. Hallet . . . . .	61, 339, 352	Dunnicliff v. Mallett . . . . .	62
Dodgson, Ex parte . . . . .	565, 741	Durham's Case . . . . .	201
Doe v. Baker . . . . .	280	Dutch West India Co. v. Moses . . . . .	115
— v. Bluck . . . . .	328, 562	Dutton v. Morrison . . . . .	357, 359, 632, 671, 675, 695
— v. Horn . . . . .	562	Duvergier v. Fellows . . . . .	99, 102*
— v. Hulme . . . . .	139	Dyke v. Brewer . . . . .	207*
— v. Ingelby . . . . .	634	Dyster, Ex parte . . . . .	690
— v. Miles . . . . .	328, 572	Eager v. Barnes . . . . .	153
— v. Prosser . . . . .	58	Eason v. Henderson . . . . .	560
— v. Roe . . . . .	273	Easterbrook v. Barker . . . . .	30
— v. Summersett . . . . .	139	Eastern Union Railway Co. v. Cochrane . . . . .	118
Dolman v. Orchard . . . . .	214, 215, 216	East India Co. v. Blake . . . . .	383, 384, 455
Domville v. Solly . . . . .	506	Eastwood v. Bain . . . . .	180
Donaldson v. Williams . . . . .	147	Easum v. Cato . . . . .	655, 656*
— v. Williamson . . . . .	314	Ebbett's Case . . . . .	76
Doo v. Chippenden . . . . .	281	Ebbs v. Boulnois . . . . .	752, 756
Doran v. Simpson . . . . .	613		
Dore v. Wilkinson . . . . .	146		
Dorman, Ex parte . . . . .	685		
Doubleday v. Muskett . . . . .	45		
Douglas v. Patrick . . . . .	136		

Eberle's Hotels Co. v. Jonas . . . . .	658	Ernest v. Nicholls . . . . .	189
Eckhardt v. Wilson . . . . .	289	Essell v. Hayward . . . . .	582*
Eddie v. Davidson . . . . .	357	Essex v. Essex 81, 333, 345,* 411,	429, 479
Edgington v. Fitzmaurice . . . . .	481	Estwick v. Conningsby . . . . .	551
Edmiston v. Wright . . . . .	373*	European Bank, Ex parte . . . . .	719
Edmonds, Ex parte . . . . .	722, 723*	Evans, Re . . . . .	604, 606, 607*
— v. Bushell . . . . .	181*	— v. Buck . . . . .	501
Edmonson v. Davis . . . . .	101	— v. Coventry 391, 517, 539, 546,*	551
Edmunds v. Robinson . . . . .	69	— v. Curtis . . . . .	112
— v. Wallingford . . . . .	369, 373	— v. Drummond 213, 214, 243,	244, 247,* 253, 255
Edmundson v. Thompson 43, 85,	202	— v. Hooper . . . . .	458
Edwards, Ex parte (1 Atk.) . . . . .	660	— v. Richardson . . . . .	72, 92, 104
— (13 Q. B. D.) . . . . .	665	— v. Smallcombe . . . . .	467
— (14 Q. B. D.) . . . . .	703	— v. Stokes . . . . .	460, 461
— v. Aberayron Mutual Soc. . . . .	98,	— v. Yeatherd . . . . .	386
— v. Cooper . . . . .	452	Everet v. Williams . . . . .	93*
— v. Glyn . . . . .	630, 653	Everett v. Backhouse . . . . .	671, 729
— v. Hooper . . . . .	666	Everth v. Blackburne . . . . .	97
— v. Martin . . . . .	678, 680	Ewart v. Williams . . . . .	537
— v. Scarsbrook . . . . .	709	Ewer v. Ambrose . . . . .	86
Eggington v. Cumberledge . . . . .	272	Ewing, Re . . . . .	340
Ekins v. Brown . . . . .	340	— v. Ewing . . . . .	390, 430
Elbinger Actien, etc. v. Claye . . . . .	275	— v. Osbaldiston 101, 102,* 355	
Electric Telegraph Co. of Ire-		Eyre, Ex parte 148, 153, 158,* 179	
land . . . . .	575	Faikney v. Reynous . . . . .	105
Elgie v. Webster . . . . .	564	Fair v. McIver . . . . .	659, 663
Elliot v. Brown . . . . .	328, 341, 541	Fairburn v. Pearson . . . . .	552
— v. Davis . . . . .	130, 136	Fairlie, Ex parte . . . . .	704, 706
Elliott v. Turquand . . . . .	663	— v. Fenton . . . . .	177
Ellis, Ex parte (Mon. & Bl.) . . . . .	673	— v. Quinn . . . . .	272
— (2 Gl. & J.) . . . . .	737, 742	Fairthorne v. Weston . . . . .	465, 497,*
— v. Kelly . . . . .	99	Co. . . . .	540, 575, 582
— v. Schmoeck . . . . .	42	Faith v. Richmond . . . . .	184,* 185*
— v. Walker . . . . .	626	Falcke v. Scottish Imp. Ins.	
— v. Ward . . . . .	22	Co. . . . .	372
— v. Watson . . . . .	90	Feldo v. Griffin . . . . .	213
Ellston v. Deacon . . . . .	171	Falkland v. Cheney . . . . .	420
Elmer v. Creasy . . . . .	507	Fannin v. Anderson . . . . .	258
Elphinstone v. Monkland Iron		Farhall v. Farhall . . . . .	47, 606
and Coal Co. . . . .	455	Farlow, Ex parte . . . . .	753
Elton, Ex parte . . . . .	692, 730	Farquhar v. Hadden . . . . .	340, 619
Emly, Ex parte 325, 329, 703, 731		Farr v. Pearce . . . . .	437, 444
— v. Lye . . . . .	186, 189*	Farrar v. Beswick . . . . .	349, 568
Emma Silver Mining Co. v.		— v. Deflime . . . . .	214
Grant . . . . .	707, 752	— v. Hutchinson . . . . .	135, 270
Emmet v. Butler . . . . .	216	Farrington v. Chute . . . . .	515
Empress Engineering Co., Re . . . . .	434	Fauntleroy's Case . . . . .	155
Empson's Case . . . . .	88	Fawcett v. Whitehouse 303, 313,*	391, 494, 496
Emberby, Ex parte . . . . .	690	Featherstone v. Hunt . . . . .	244, 249
Endo v. Caleham . . . . .	512	Featherstonhaugh v. Fenwick 121,	122, 307,* 340, 410, 413, 527, 555,
England v. Curling 312, 409, 413,		571, 574, 592	
476,* 517, 539*		— v. Turner 66, 381, 423,* 424,	479, 525, 527, 528; 536,* 616
English and American Bank,			
Ex parte . . . . .	716		
English and Irish Church and			
Univ. Ins. Soc. . . . .	32*		
Erichsen v. Last . . . . .	394		

Fell, Ex parte	334, 336, 687, 688, 698	Ford, Ex parte (3 M. D. & D.)	715
Fennings v. Grenville	19, 61, 316, 562	— (18 Q. B. D.)	626
Fereday v. Hordern	16, 30	— v. Tynte	538
— v. Wightwick	55, 57, 333, 517, 728	— v. Whitmarsh	42
Ferguson v. Fyffe	128, 139, 247, 390	Fordyce's Case	634,* 635
Ferns v. Carr	65, 66, 67	Fore Street Warehouse Co. v.	
Ferrar, Re	703	— Durrant & Co.	266
Fewings, Ex parte	255	Forman v. Homfray	494, 497
Ffooks v. South Western Railway Co.	410	Forrester v. Bell	24
Field, Ex parte	731	Forshaw, Re	120
— v. Carr	230	Forster, Ex parte	651
Fife, Ex parte	624	— v. Hale	81,* 82, 324
— Banking Co., Ex parte	322	— v. Lawson	278
Figes v. Cutler	80, 559	— v. Mackreth	133
Figgins v. Ward	273	— v. Smith	659*
Finch, Ex parte	588, 652, 669	— v. Wilson	663
Findlay, Ex parte	599, 720, 728, 730	Foss, Ex parte	678, 681
Finkle v. Stacey	18	— v. Harbottle	466
Firbanks Ex. v. Humphreys	45, 163, 481	Foster v. Allanson	564, 668
Fisher, Ex parte	628, 629	— v. Crabb	562
— v. Bridges	105	— v. Donald	505, 506
— v. Farrington	601	— v. Hodgson	509
— v. Keane	466	Fowler v. Coster	639
— v. Liverpool Marine Ins. Co.	98	— v. Raynal	113
— v. Taylor	132, 133, 190, 203	— v. Wyatt	514
Fitzgibbon v. Scanlan	308	Fox v. Clifton	12, 25, 43, 83, 85, 90, 365
Fitzherbert v. Mather	141	— v. Frith	565
Fleet v. Murton	177	— v. Hanbury	146, 212, 218, 562, 568, 569,* 583, 647, 648, 649, 666, 671,* 672
Fleming v. Manchester, Sheffield & Lincolnshire Railway Co.	199	Foxley, Ex parte	627
Fleming v. Hector	50	France v. White	292
Fletcher, Ex parte	678, 685	Francis v. Doe	562
— v. Dyche	291	Frankland v. McGusty	171
— v. Stevenson	594	Franklyn, Ex parte	730
Flint, Ex parte	656, 661	— v. Thomas	359
Flintoff, Ex parte	702, 703	Franks, Ex parte	77
Flintum, Ex parte	729	Fraser v. Hill	99
Flitcroft's Case	394	— v. Kershaw	542, 549,* 568, 588, 671, 673
Flockton v. Bunning	522, 524, 530,* 535, 615, 617, 618	— v. Murdoch	374
Flood v. Patterson	263	Freeland v. Stansfield	67, 69, 542, 549, 670
Flower, Ex parte	711	Freeman, Ex parte (Buck)	208, 705, 706, 745
— v. Young	85	— (Cooke's B. L.)	725
Flyn, Ex parte	683, 687	— v. Cooke	40
Foley, Ex parte	101	— v. Fairlie	404, 504, 537
— v. Hill	508	— v. Gainsford	348
Forbes v. Skelton	259	— v. Lomas	291
— v. Steven	348	— v. Pope	627
Ford, Re (8 Dowl.)	152	Freen, Ex parte	119
— Ex parte (1 Ch. D.)	639	French v. Andrade	291, 341
		— v. Fenn	665*
		— v. French	209
		— v. Macale	455
		— v. Styling	14, 18,* 51, 54, 564
		Freshney v. Carrick	677, 682

Frietas v. Dos Santos . . .	492	Gibbs v. Merrill . . .	74, 281
Frith v. Cartland . . .	162	Gibson, Ex parte (2. Mon. & Ayr.) . . .	337, 699
— v. Forbes . . .	711	— (4 Ch.) . . .	248
Fromont v. Coupland 13,* 323, 565, 567		— v. Goldsmid . . .	479
Frost v. Moulton . . .	121, 122	— v. Lupton . . .	18,* 54
Frowde v. Williams, see Add. to p. 38.		Gilchrist, Ex parte . . .	78
Fry, Ex parte 208, 705, 706, 745		Gill, Ex parte . . .	741
Fryer v. Ward . . .	619	— v. Manchester, Sheffield, etc. Railway Co. . .	78
Fuller, Ex parte . . .	695	Gillam, Ex parte . . .	642
Furnival v. Weston . . .	145*	Gillan v. Morrison 369, 374, 385	
		Gillett, Ex parte . . .	683
Gabriel v. Evill . . .	21,* 202	— v. Thornton . . .	411, 453
Gadd v. Houghton . . .	179	Gillow v. Lillie . . .	130
Gainsborough v. Stork . . .	430	Gilpin v. Enderby . . .	13, 16, 30
Gainsford v. Griffith . . .	455	Ginesi v. Cooper & Co. . .	440
Gale v. Leckie 14, 559, 563		Glassington v. Thwaites 312, 316, 423,* 540*	
— v. Lewis . . .	680	Gleadon v. Tinkler . . .	169
Gallimore, Ex parte . . .	636	Gleadow v. Hull Glass Co. . .	382, 383, 386
Galway v. Matthew 170,* 174,* 175,* 188,* 190, 210, 370		Gledstanes, Ex parte . . .	653
Games, Ex parte . . .	631	Glengall (Earl of) v. Fraser . . .	503
Garbett v. Veale . . .	361, 676	Glenny v. Smith . . .	446
Garden Gully Co. v. McLister 470, 472, 475, 498		Gliddon, Ex parte 111, 721, 725, 737*	
Gardiner v. Childs 14, 144, 179, 203		Glossop v. Colman . . .	74
Gardner, Ex parte . . .	639	Gloucester, Aberystwith, etc. Railway Co., Re . . .	133
— v. London, Chat. & Do. R'y Co. . .	545	Glyn, Ex parte . . .	653
— v. McCutcheon . . .	309*	— v. Caulfield . . .	504
— v. Rowe . . .	630	— v. Hood . . .	364, 584
Gardom, Ex parte . . .	138	Goddard v. Cox . . .	228
Garland, Ex parte 28, 593, 604, 608,* 609, 722, 724		— v. Hodges . . .	28, 227, 567, 584
— v. Jacomb 131, 171, 216		— v. Mansfield . . .	454
Garrard v. Hardey . . .	93	Godfrey, Ex parte . . .	755
Garrett v. Handley . . .	275*	— v. Macauley . . .	222
Garstin v. Asplin . . .	359	— v. Turnbull . . .	222
Gaskell v. Chambers . . .	503	Gold v. Canham . . .	543
Geaves, Ex parte 151, 161, 683, 702, 716		Golding v. Vaughan . . .	291
Geddes v. Wallace 10, 13, 15, 64, 385, 393, 409		Goldsmid v. Cazenove . . .	748
Gedge v. Trail . . .	487, 613	Goldsmith v. Levy . . .	271
Gellar, Re (1 Rose) . . .	28, 140	Good, Ex parte (5 Ch. D.) . . .	239
Geller, Ex parte (2 Madd.) . . .	733*	— (21 Ch. D.) . . .	669
Gemmel, Ex parte . . .	353	— v. Blewitt . . .	463
General Co. of Land Credit . . .	91	Goodall, Ex parte . . .	753
General South American Co., Ex parte . . .	712	— v. Skerratt . . .	259
George v. Claggett . . .	295	Goode v. Harrison . . .	74, 76*
Gerhard v. Bates . . .	482	Goodman, Ex parte . . .	715
German Mining Co.'s Case 191, 383		— v. De Beauvoir . . .	271
Gething v. Keighley . . .	513	— v. Whitcombe 301, 404, 546, 548, 551, 580	
Gibblett v. Read . . .	443	Goodtitle v. Tombs . . .	58
Gibbons v. Wilcox . . .	90	— v. Woodward . . .	129
Gibbs, Ex parte . . .	753	Goodwin v. Parton . . .	263
— v. Guild . . .	260	Gordon, Ex parte 599, 649, 722, 723	

Gordon v. Ellis	131, 140, 269, 292	Green v. Waring	454
— v. Howden	293,* 294,* 296*	— v. Weaver	97
— v. Rutherford	99	Greenham v. Gray	11, 12, 14, 563
Gorham v. Thompson	519	Greening v. Clarke	679
Gorrie v. Woodley	223	Greenshield's Case	650
Gothenburg Commercial Co., Re	112	Greenslade v. Dower	131, 132, 203
Gough v. Davies	710	Greenwood's Case	175
Gould, Ex parte	246,* 253	Gregory v. Hurrill	259
—, Re, Ex parte Official Receiver	152	— v. Patchett	314, 395
— v. Shoyer	Add. to p. 628	Grellier v. Neal	89
Goulding and Davies, Ex parte	643	Greville v. Greville	113
Gouthwaite v. Duckworth	173, 703	Griffin, Ex parte	636
Gover's Case	204, 205*	— v. Ashby	262
Gow v. Forster	480	Griffith, Re (12 Ch. D.)	621
Gowan v. Forster	621	— Ex parte (23 Ch. D.)	623, 629
Gowar, Re	261	— v. Paget	395
Grace v. Smith	26, 27,* 28, 29, 30	Griffiths, Re	257
Graham, Ex parte	706	— v. Griffiths	120, 439
— v. Chapman	629	Grill, Ex parte	736
— v. Furber	677, 681	Griswood's Case or Ex parte	93
— v. Hope	222, 223	Grissell, Ex parte	624
— v. McCulloch	687, 689,* 700	Griswold v. Waddington	72, 585
— v. Mulcaster	638, 646	Groom, Ex parte	716, 750
— v. Robertson	289, 565	Cross v. Dufresnay	647
— v. Wichelo	240	Groux's Soap Co. v. Cooper	118
Grain's Case	247	Grugeon v. Gerrard	714
Grammar v. Nixon	148	Grylls, Ex parte	644
Grant v. Jackson	85, 89, 128	Guidon v. Robson	89, 274, 277
— v. Norwa	148	Guion v. Trask	364
— v. Prosser	272	Gurney, Ex parte	336, 698, 699, 705, 706
Graves v. Cook	565	— v. Evans	89, 181
— v. Sawcer	568	Guthrie v. Fisk	633
Gray, Ex parte	635*	Gwyn v. Godby	389
— v. Chiswell	598, 599	Habershon v. Blurton	358, 359, 360, 493
— v. Haigh	405, 538	Hackwell v. Eustman	493
— v. Pearson	51, 458	Haddon v. Ayers	563
Grayburn v. Clarkson	612	Hadley, Ex parte	752
Grazebrook, Ex parte	741*	— v. Macdougall	504
Great Luxembourg Railway Co. v. Magnay	508	Hagell v. Currie	506
— Western Colliery Co. v. Tucker	508	Hague v. Rolleston	646, 649, 667,* 668
— Western Insurance Co. v. Cunliff	307, 458, 492	Haig v. Gray	284, 342
— Western Railway Co. v. Rushout	315	Haines, Ex parte	644
Greatrex v. Greatrex	404, 420, 542	Hale v. Allnutt	630
Green, Ex parte (3 De G. & J.)	644	— v. Hale	108, 520, 552,* 555
— (1 D. & C.)	693	Hales v. Petit	340
— v. Beesley	11*	Halfhide v. Fenning	452
— v. Briggs	54, 61, 62, 355	Halket v. Merchant Traders' Loan and Insur. Assoc.	201
— v. Deakin	171	Hall, Ex parte (3 Deac.)	741
— v. Greenbank	74	— (De Gex)	638
— v. Humphreys	260	— (Mon. & Ch.)	633, 636
		— (9 Ves.)	731
		— (17 Ves.)	624
		— v. Bainbridge	177, 281
		— v. Barrows	447

Hall v. Curzon . . . . .	86	Harper, Ex parte (1 De G. & J.) . . . . .	435,* 436
— v. Fennell . . . . .	608	— (20 Ch. D.) . . . . .	636
— v. Franklin . . . . .	71	— v. Godsell . . . . .	140, 569
— v. Hall (12 Beav. and 3 Mac. & G.) 539, 540,* 545,* 546, 547, 549, 572		Harrington v. Churchward 35, 493	
— — (20 Beav.) . . . . .	447	Harris, Ex parte (1 Mad.) 187, 686,* 700, 732	
— v. Huffam . . . . .	341	— (1 Ro. and 2 V. & B.) 721, 725, 734	
— v. Lanning . . . . .	271	— v. Farwell 247, 250, 251,* 596, 600, 644	
— v. Noyes . . . . .	508	— v. Fergusson . . . . .	51
— v. Rougham . . . . .	341	— v. Harris . . . . .	507
— v. Smith . . . . .	188	— v. Hill . . . . .	89
— v. West . . . . .	183*	— v. Nickerson . . . . .	480
Hallett v. Dowdall . . . . .	201	— v. Rickett . . . . .	629
Hallett's Estate, Re 162, 228, 234		Harrison, Ex parte (2 Rose) 54, 61	
Halliday, Ex parte . . . . .	628	— (2 Gl. & J.) . . . . .	641
Hambridge v. De la Crouée . . . . .	272	— (28 Ch. D.) . . . . .	652
Hambro v. Hull and London Fire Insurance Co. . . . .	181	— v. Armitage . . . . .	496, 546
Hamer, Ex parte . . . . .	644	— v. Barton . . . . .	51
— v. Giles . . . . .	517, 518	— v. Bevington . . . . .	278, 279
Hamers' Devises' Case . . . . .	212	— v. Brown . . . . .	463
Hamil v. Stokes 66, 67, 69, 482, 739		— v. Gardner . . . . .	440, 442*
Hamilton v. Bell . . . . .	677, 682	— v. Jackson . . . . .	137, 271
— v. Smith . . . . .	24, 385	— v. Miller . . . . .	97
Hammersley v. Knowlys . . . . .	227	— v. Tennant 575, 580, 581,* 582	
Hammond, Ex parte . . . . .	752	Hart v. Alexander 223, 248,* 254	
— v. Douglas . . . . .	343, 344, 526	— v. Clarke 390, 391, 428, 470, 472,* 473, 475, 572, 574	
— v. Ward . . . . .	543	Hartley v. Manton . . . . .	238*
Hampden v. Walsh . . . . .	106	Hartop, Ex parte . . . . .	177, 190, 703
Hamper, Ex parte 28, 29,* 30, 328, 359, 633, 637, 640		Hartz v. Schrader . . . . .	542, 547
Hancock v. Bewley . . . . .	62	Harvey v. Beckwith 51, 464, 517	
— v. Haywood . . . . .	289, 647	— v. Bignold . . . . .	460, 461
— v. Hodgson . . . . .	177	— v. Collett . . . . .	105, 106, 463
Hankey v. Garratt . . . . .	671	— v. Crickett 218, 569, 667, 672,* 674	
— v. Hammock . . . . .	609	— v. Kay . . . . .	87, 89
— v. Smith . . . . .	657	— v. Towers . . . . .	169
Hanslip v. Kitton . . . . .	350	Harwood v. Edwards . . . . .	271*
Hanson, Ex parte . . . . .	661	Hasleham v. Young . . . . .	138
Harcourt, Ex parte . . . . .	636	Hassel v. Simpson . . . . .	631
Hardcastle, Ex parte . . . . .	640*	— v. Merchant Traders' Loan and Insurance Assoc. 201	
Harding, Ex parte (15 Eq.) . . . . .	682	Hassells v. Simpson . . . . .	631
— (12 Ch. D.) . . . . .	138, 179, 192	Hatchard v. Mège . . . . .	595
— v. Glover . . . . .	548, 551	Hatton v. Royle . . . . .	129, 272
— v. Williams . . . . .	537	Hawken v. Bourne 124, 133, 176	
Hardinge v. Webster . . . . .	543	Hawker, Ex parte . . . . .	627
Hardman v. Booth . . . . .	41	Hawkins v. Hawkins 328, 334, 337, 541	
Hare, Ex parte . . . . .	325, 328, 684*	— v. Parsons . . . . .	517
— v. London & North-western Railway Co. . . . .	507	— v. Penfold . . . . .	663
Hargreaves, Ex parte 721, 722,* 726, 736		— v. Ramsbottom . . . . .	290
— v. Hall . . . . .	559	— v. Whitten . . . . .	663
Hargrove, Ex parte . . . . .	98	Hawkshaw v. Parkins 135, 137, 145, 359	
Harkness v. Steward . . . . .	482	Hawtayne v. Bourne 126, 132, 190	
Harley v. Greenwood . . . . .	718		
Harman, Ex parte . . . . .	721		
— v. Johnson . . . . .	131, 151, 156*		



Hawtrey, Ex parte . . . . .	685	Hichins v. Congreve . . . . .	303, 313, 464,
Hay, Ex parte . . . . .	254, 704, 743	— . . . .	496, 506
— v. Fairbairn . . . . .	678	Hickie & Co.'s Case . . . . .	713
— v. Mair . . . . .	213	Hickin, Ex parte . . . . .	22, 727
Hayden, Ex parte . . . . .	731	Hickman v. Cox . . . . .	30*
Haydon, Ex parte . . . . .	729	Higgen's Case . . . . .	255, 256
Hayman, Ex parte . . . . .	688, 690,* 700	Higgins, Ex parte . . . . .	255, 703
Haythorne v. Lawson . . . . .	278	— v. Sargent . . . . .	389
Hayward, Ex parte (Cooke's B. L.) . . . . .	694	— v. Senior . . . . .	192, 281
Healey v. Story . . . . .	188*	Hill, Ex parte (3 M. & A. and 2 Deac.) . . . . .	723, 745, 750*
Heap v. Dobson . . . . .	203	— Ex parte (2 Bos. & P. N. R.) . . . . .	733
Heath, Ex parte . . . . .	688	— (23 Ch. D.) . . . . .	629
— v. Hall . . . . .	718	— v. King . . . . .	390, 538
— v. Hubbard . . . . .	61	— v. Smith . . . . .	656
— v. Percival . . . . .	243,* 253, 602	Hill & Hymans, Ex parte . . . . .	638
— v. Sansom . . . . .	121, 169, 213,* 363,	Hill's Case (20 Eq.) . . . . .	595
	583	Hills v. McRae . . . . .	193, 284, 596, 597,
Heathcote v. Hulme . . . . .	522, 531, 615,	— . . . .	598, 599, 600
— v. Livesley . . . . .	616, 617	— v. Nash, . . . . .	460
Heaton, Ex parte . . . . .	143, 160,* 161,	Hindmarsh, Re . . . . .	260
	191	Hinds, Ex parte . . . . .	324, 734
Hedley v. Bainbridge . . . . .	131	Hirsch v. Im Thurn . . . . .	453
Heilbut v. Nevill . . . . .	131, 172, 269,*	Hirst v. Tolson . . . . .	66
	289, 486, 637	Hitchcock, Ex parte . . . . .	706
Helen, The . . . . .	92	Hoare v. Contencin . . . . .	193
Hellier, Ex parte . . . . .	714	— v. Dawes . . . . .	18
Helme v. Smith . . . . .	54, 124, 566	— v. Oriental Bank Corpo- ration . . . . .	111, 701
Helmor v. Smith (No. 1) . . . . .	323, 358,	— v. Peck . . . . .	509
— . . . .	359, 360, 361	Hobbs v. Wayet . . . . .	374, 375
— v. Smith (No. 2) . . . . .	539, 554	Hobson, Re . . . . .	675
Helsby v. Mears . . . . .	207	— v. Bass . . . . .	228
Hemings v. Pugh . . . . .	453	Hoby v. Roebuck . . . . .	240
Henderson, Ex parte . . . . .	75, 281	Hodges v. London Trams Om- nibus Co. . . . .	446
— v. Eason . . . . .	59, 560	Hodgkin, Ex parte . . . . .	629, 630
— v. Royal British Bank . . . . .	103,	Hodgkinson, Ex parte . . . . .	254, 624,
	491	— . . . .	702, 704, 732
— v. Wild . . . . .	135, 270	— v. Mayer . . . . .	101
Hendricks v. Montagu . . . . .	114	— v. Travers . . . . .	642
Hendry v. Turner . . . . .	214, 426, 588	Hodgson, Re (3 A. & E.) . . . . .	100
Henley v. Soper . . . . .	564	— Re (31 Ch. D.) . . . . .	193, 195, 257,
Henniker v. Wigg . . . . .	235	— . . . .	284, 460, 596, 597, 598, 603
Hercy v. Birch . . . . .	476	— Ex parte (2 Bro. C. C.) . . . . .	729
Herkimer, The . . . . .	63	Hogarth v. Latham . . . . .	128, 130
Herman v. Jeuchner . . . . .	106	— v. Wherley . . . . .	136
Hermann Loog v. Bean . . . . .	542, 543	Hogg v. Bridges . . . . .	632
Hern v. Nichols . . . . .	143	— v. Skene . . . . .	169
Hernaman, Ex parte . . . . .	255, 703	Hoggard v. Mackenzie . . . . .	679, 682,
Herries v. Jamison . . . . .	299	— . . . .	684*
Herring v. Walround . . . . .	92	Holden v. Webber . . . . .	309
Hesham, Ex parte . . . . .	726, 736	Holderness v. Rankin . . . . .	682
Hesketh v. Blanchard . . . . .	28, 563	— v. Shackels . . . . .	352, 355, 647, 728
Heslin v. Hay . . . . .	321	Holdsworth, Ex parte . . . . .	169, 170, 593,
Heslop, Re . . . . .	677	— . . . .	604, 703
Heydon v. Heydon . . . . .	357*	Hole v. Bradbury . . . . .	114, 288
Heyhoe v. Burge . . . . .	12, 28, 29,* 49, 89	— v. Harrison . . . . .	376
Heyne v. Middlemore . . . . .	493		
Heywood v. Watson . . . . .	565		

Holford, Ex parte . . . . .	645, 646	Huber v. Steiner . . . . .	259
Holgate v. Shutt . . . . .	513, 514, 520	Huckey, Ex parte . . . . .	657
Holiday, Re . . . . .	272	Huddleston's Case . . . . .	578
Holland v. King . . . . .	433	Hudson v. Forster . . . . .	651
— v. Teed . . . . .	118	— v. Robinson . . . . .	187, 282
Holliday v. Camsell . . . . .	562	Hue v. Richards . . . . .	537
Hollyford Mining Co. . . . .	403	Hughes, Re (2 Hem. & M.) . . . . .	678
Holman v. Johnson . . . . .	104	— Ex parte (4 Ch. D.) . . . . .	255
Holme v. Hammond . . . . .	32,* 34, 36, 125, 593, 604	— v. Statham . . . . .	100
Holmes, Ex parte . . . . .	753	— v. Sutherland . . . . .	324
— v. Bell . . . . .	256	— v. Thorpe . . . . .	97
— v. Blogg . . . . .	75	Hughes-Hallett v. Indian Mammoth Gold Mines Co. 374, 375	
— v. Higgins . . . . .	23,* 24, 380, 567	Hume v. Bolland . . . . .	155, 165
— v. Mentze . . . . .	358	Hunt v. Jessel . . . . .	291
— v. Old Colony R. R. Co. . . . .	79	— v. Royal Ex. Assurance Co. . . . .	139
Holroyd v. Griffiths . . . . .	355	Hunter, Ex parte (1 Atk.) 703, 721*	
— v. Holroyd . . . . .	346	— (Buck) . . . . .	741
Holyland v. De Mendez . . . . .	436*	— (2 Rose) . . . . .	646, 684,* 701
Homfray v. Fothergill . . . . .	423,* 424, 479, 541*	— (6 Ves.) . . . . .	715
Honduras, etc., Co. v. Lefevre . . . . .	501	— v. Belcher . . . . .	512, 513
Honduras Rail. Co. v. Tucker . . . . .	280, 282	— v. Gibbons . . . . .	259
Honey, Ex parte . . . . .	745, 748	Husbands, Ex parte . . . . .	747
Hood v. Aston . . . . .	542	Hutcheson v. Smith . . . . .	380, 382, 383, 391, 537
Hookham v. Pottage . . . . .	440, 543	Hutchinson v. Sturges . . . . .	290
Hookins, Ex parte . . . . .	709	— v. Sydney . . . . .	290
Hooman, Ex parte . . . . .	678	— v. Whitfield . . . . .	126, 454, 572
Hooper, Ex parte . . . . .	120	— v. Wright . . . . .	495
— v. Keay . . . . .	229	Hutton v. Bullock . . . . .	204, 275
— v. Lusby . . . . .	139	— v. Crutwell . . . . .	629
Hope v. Cust . . . . .	138	— v. Eyre . . . . .	237
— v. Meek . . . . .	634, 635	— v. Rossiter . . . . .	594
Hopkins v. Smith . . . . .	100, 101, 275	— v. Thompson . . . . .	24
Horn v. Baker . . . . .	677, 678, 683, 688*	— v. Upfill . . . . .	23
— v. Gilpin . . . . .	60	Hyatt v. Hare . . . . .	144
Hornblower v. Proud . . . . .	678	Hybart v. Parker . . . . .	458
Hornsby v. Miller . . . . .	679, 682	Hyde v. Johnson . . . . .	261
Horrell v. Witts . . . . .	549	Ibbetson, Ex parte . . . . .	678
Horsfall, Ex parte . . . . .	438	Ibbotson v. Elam . . . . .	620, 621
Horsley v. Bell . . . . .	206	Ide, Re . . . . .	626
— v. Knighton's Patent . . . . .	62	Imbert, Ex parte . . . . .	711
Hort's Case . . . . .	247	Imperial Gas Co. v. London Gas Co. . . . .	259
Hough v. Manzanos . . . . .	180	Imperial Mercantile, Credit Association v. Coleman . . . . .	161, 306
Houghton, Ex parte . . . . .	324	Indian Chief, The . . . . .	73
— v. Houghton . . . . .	345	Inglis v. Haigh . . . . .	259, 510
Houldsworth v. City of Glas- gow Bank . . . . .	163, 480	Inman v. Clare . . . . .	656, 712
Houlton's Case . . . . .	47, 211, 605	Innes v. Stephenson . . . . .	268
Houriet v. Morris . . . . .	73	Ireland v. Livingstone . . . . .	370
Hovenden v. Annesley . . . . .	508	Iretton v. Lewis . . . . .	460, 461
Howard v. Shaw . . . . .	491	Irvine v. Young . . . . .	512
— v. Tucker . . . . .	370	Irving v. Veitch . . . . .	261
Howarth v. Brearley . . . . .	99	Isaac, Ex parte . . . . .	718
Howbeach Coal Co. v. Teague . . . . .	315	Isitt v. Beeston . . . . .	627, 681
Howden, Ex parte . . . . .	140, 147, 324	Izard, Ex parte . . . . .	627, 629
Howe v. Lord Dartmouth . . . . .	620		
Howell v. Brodie . . . . .	22*		

Jacaud v. French	134, 141, 568, 569	Johnson v. Helleley	440, 558
Jackey v. Butler	357	— v. Hudson	95
Jackson, Ex parte (De Gex)	631	— v. Peck	139
— (2 M. D. & D.)	254, 705	— v. Perens	360*
— (1 Ves. Jr.)	206,* 208, 705	— v. Pye	74
— (5 Ves.)	715	Johnston v. Curtis	514
— Re (1 B. & C.)	103	— v. Moore	621
— v. Jackson	332,* 333, 341, 346, 432	Joll v. Lord Curzon	280
— v. Litchfield	266	Jombart v. Woollett	673
— v. Ogg	510	Jones' Case (15 Jur.)	794
— v. Sedgwick	409, 432, 543	Jones, Ex parte (18 Ch. D.)	75, 624
— v. Stanhope	359	— (10 Ch.)	709
— v. Stopherd	563, 564	— (4 M. & S.)	324
— v. Woolley	263, 597	— v. Beach	193, 196
Jacobs v. Seward	58, 59, 61, 568	— v. Broadhurst	226
Jacobsen v. Hennekinius	84	— v. Charlemont	491
Jacomb v. Harwood	195, 250, 253, 257, 596, 602, 603	— v. Clayton	299
Jacques v. Chambers	620	— v. Corbett	169
Jaffray v. Frebain	74, 281	— v. Dwyer	681
Jaggers v. Binnings	128	— v. Foxall	523, 531, 615
James, Re	624	— v. Gibbons	651, 678
— v. Kynnier	661*	— v. Harber	628, 631
Jameson, Ex parte	709	— v. Herbert	145
Janes v. Whitbread	30	— v. Lloyd	426, 572, 577, 579
Janson, Ex parte	732	— v. Maund	233*
Jardine v. McFarlane	179	— v. Noy	77, 520, 577*
Jauncy v. Knowles	482, 484	— v. Ogle	621
Jebsen v. East and West India Dock Co.	292	— v. Pengree	508
Jefferson, The	667	— v. Peppercorne	656
Jefferys v. Agra and Masterman's Bank	296, 656	— v. Shears	113
— v. Small	341, 342	— v. Walker	607
— v. Smith (3 Russ.)	21, 363, 365, 336, 423, 491, 501, 583, 584	— v. Welch	579
— (1 J. & W.)	55, 56, 121, 553	— v. Yates	269
Jekyl v. Gilbert	470*	Jordan v. Money	480
Jenkins v. Blizard	222, 223	Josephs v. Pebrer	370
— v. Morris	186	Joy v. Campbell	108, 652, 677, 682, 683
— v. Tucker	373	Joyce, Ex parte	100
Jenner v. Morris	191	Juggeewundas Keeka Shah v. Ramdas Brijbooken Das	139
Jennings, Ex parte	690	Kaltenbach v. Lewis	140
— v. Baddeley	576*	Kay v. Johnston	51, 60, 180, 355
— v. Broughton	484	Keatin v. Marsh	155
— v. Hammond	102, 103	Keay v. Fenwick	248, 254, 257, 704, 718
Jepson, Ex parte	644	Keble v. Thompson	161
Jervis v. White	506, 542	Kedie, Ex parte	254, 704
Jessopp v. Lutwyche	97	Kell v. Nainby	276
Jestons v. Brooke	27, 564	Kellock's Case	602
Johnes' Case (1 Mer.)	211, 605	Kellock v. Enthoven	708
Johns, Ex parte	725, 736	Kelly & Co., Ex parte	630
Johnson, Re (15 Ch. D.)	606, 697,* 609	— v. Hutton	364
— (3 De G. M. & G.)	653, 715	Kemble v. Mills	417*
— (2 M. D. & D.)	636	Kemp, Ex parte	678
— v. Evans	340, 357, 358	— v. Andrews	288, 341
— v. Fesenmeyer	630	— v. Balls	226
		Kempton, Re	338, 574, 699, 699
		Kendal v. Wood	136, 166, 172, 269

Kendall, Ex parte 250, 254, 603, 732	Labouchere v. Wharnccliffe . . . 466
— v. Hamilton 193,* 255, 598,	Lacey v. Hill 143, 236, 375, 599,
783, 732, and Add. to p. 193	734, and Add. to p. 143
Kennedy, Ex parte . . . 733	Lackington v. Combes . . . 663
— v. Lee . . . 440, 447, 549	Lacy v. Kynaston . . . 225, 237
Kensington, Ex parte (2 V. &	— v. McNeile . . . 136
B.) . . . 119, 120	— v. Woolcott . . . 212, 667*
— (14 Ves.) . . . 731	Ladbrooke, Ex parte . . . 750*
Kent v. Jackson . . . 314, 512	Laing v. Campbell 228, 421, 490,
Kerridge v. Hesse . . . 206	513
Kerrison v. Reddington . . . 113	Laird v. Chisholm . . . 523, 524
Kershaw v. Matthews 429, 434, 548,	Lake v. Argyll 44,* 89, 90
555, 573	— v. Craddock . . . 341, 342, 471*
Kewney v. Attrill . . . 300, 554	— v. Gibson . . . 51, 341, 342
Key v. Flint . . . 656	Lambert's Case . . . 146
Kibble, Ex parte . . . 704	Lambert v. Rendle . . . 615
Kiffin v. Evans . . . 237	Lampon v. Corke . . . 238
Kilgour v. Finlyson 190, 215, 218	Lancaster Canal Co., Ex parte 683
Killock v. Greg . . . 284, 460, 493	Lane, Ex parte . . . 119, 706
Kilner, Ex parte . . . 628	— v. Sterne . . . 554
Kilshaw v. Jukes 31,* 203, 204, 205	— v. Williams 131, 169, 188, 194,
King, Ex parte . . . 728, 742	596
— v. Accumulative Assur-	Lanesborough v. Jones 658, 660
ance Co. . . . 121	Lanfare, Ex parte . . . 729, 742*
— v. Chuck . . . 410,* 430, 479	Langdale, Ex parte . . . 12, 30
— v. Hoare . . . 255, 256	Langley v. Oxford . . . 494
— v. Smith . . . 134	Langmead's Trusts, Re 140, 354,*
Kingsbridge Flour Mill Co. v.	355, 451*
Plymouth Grinding and	Langmead, Re . . . 679
Baking Co. . . . 189, 190	Lascaridi v. Gurney . . . 137
Kingston, Ex parte . . . 659	Last v. London Ass. Corp. . . 394
Kinnaird v. Webster . . . 227, 230	Latch v. Wedlake . . . 137
Kinnerley v. Hossack 292, 294, 661	Latouche v. Waley . . . 112
Kinsman v. Barker . . . 514	Law, Ex parte (3 Deac. and
Kipling v. Turner . . . 117	Mon. & Ch. 111) 182, 702, 747
Kirby, Ex parte . . . 254, 705	— (Mon. & Ch. 590) . . . 739
— v. Carr . . . 578, 579*	— v. Garrett . . . 453
— v. Duke of Marlborough 227	— v. Law . . . 613
— v. Wilson . . . 268	— v. Parnell . . . 274
Kirk, Ex parte . . . 113	Lawes v. Lawes . . . 402, 409, 432*
— v. Blurton . . . 115, 184, 185*	Lawless v. Sullivan . . . 394
Kirkman v. Booth . . . 612, 615	Lawrence, Re . . . 152
Kirkwood v. Cheetham . . . 41	— v. Bowle . . . 162
Kirwan v. Kirwan . . . 246,* 253	Laws v. Rand . . . 133
Kitchin v. Wilson . . . 272	Lawson v. Morgan 466, 543, 544,
Kitson v. Hardwick . . . 652	549
Knapman, Re . . . 364	Leaf, Ex parte (1 Deac.) . . . 685
Knebell v. White . . . 494, 497	— (Mon. & Ch.) . . . 688
Knight v. Marjoribanks . . . 485*	— (4 Deac.) . . . 700
Knowles v. Haughton 97, 105, 498	— v. Coles . . . 557,* 577
Knox v. Bushell . . . 191	Leak v. McDowell . . . 113
— v. Gye . . . 508, 510,* 617	Leake v. Young . . . 628
Knudson v. Pybus . . . 114	Leary v. Shout . . . 581
Krehl v. Great Central Gas	Lee, Re . . . 624
Co. . . . 675	— v. Haley . . . 114
Kynaston v. Crouch . . . 663, 665	— v. Hart . . . 629
	— v. Page . . . 66, 68
Labouchere v. Tupper 28, 604, 606	Lees, Ex parte (1 Deac.) . . . 75
— v. Dawson . . . 440	— (16 Ves.) . . . 642

Lees v. Jones	55, 56, 553, 557, 571	Livingston v. Ralli	451
— v. Laforest	303, 449, 591	Llewellen, Ex parte	754
— v. Smith	97, 105	Lloyd, Ex parte (1 G. & J.)	119
Leese v. Martin	272	— (1 Mon. & Ayr.)	140
Leeson v. Holt	222	— (3 Mon. & Ayr.)	717
Le Fanu v. Malcolmson	279	— v. Archbowl	276
Lefevre v. Boyle	277	— v. Ashby	180, 186
Lefroy v. Gore	367, 368, 382, 385, 386	— v. Banks	680
Leggott v. Barrett	440	— v. Blackburne	117
Leicestershire Banking Co., Ex parte	717	— v. Dimmack	Add to p. 375
Leiden v. Lawrence	90, 134	— v. Freshfield	131, 168, 190, 721
Leigh's Estate, Re	508	— v. Loaring	5, 50, 301, 463
Leigh v. Birch	613	Lobb, Ex parte	254, 704
— v. Dickeson	60	Lock v. Lynam	311*
Leighton v. Wales	563	— v. Venables	621
Lemere v. Elliott	209	Lockett v. Lockett	502, 508
Lempriere v. Lunge	75	Loder's Case	713
Le Neve v. Le Neve	141	Lodge and Fendal, Ex parte	633, 725, 734, 735,* 739
Lennox, Ex parte	703	Lodge v. Dicas	242,* 243, 253
Leslie, Re	60, 355, 372	— v. Prichard	536, 537, 599, 692
Letts and Steer, Ex parte	386,* 387	Lomas, Ex parte	754
Leveck v. Shafto	276	Lomax v. Buxton	629
Leverson v. Lane	171, 172	London Assurance Co. v. Bold	118
Levett, Ex parte	670	— Birmingham & Buck's Railway Co., Re	538
Levey, Re	742	— Bombay & Med. Bank v. Narraway	654
Levi & Co.'s Case	714	— Brighton & S. C. R'y v. Goodwin	118
Levy v. Pyne	131	— Financial Association v. Kelk	54, 421
— v. Walker	445, 446, 447	— India Rubber Co.	402
Lewis v. Armstrong	99	— & N. W. R'y Co. v. McMichael	75, 76
— v. Bright	71	— & Southern Counties Freehold Land Co., Re	315
— v. Edwards	449, 567, 569	— Syndicate v. Lord	506
— v. Langdon	93, 217, 443, 445*	Long v. Yonge	460, 461
— v. Nicholson	163, 282	Longman v. Pole	279
— v. Reilly	129, 131, 169, 215, 216,* 220	— v. Tripp	678
— v. White	672	Longworth's Executor's Case	91, 104, 109, 379*
Liardet v. Adams	580	Loring v. Davies	371
Lickbarrow v. Mason	652	Loscomb v. Russell	494, 497
Liddel, Ex parte	746	Lovegrove v. Nelson	13, 365*
Limpus v. London General Omnibus Co.	148, 150	Loveil v. Hicks	49, 164,* 167
Lindo v. Lindo	238	Loving, Ex parte	680
Lindon v. Sharp	627	Low v. Routledge	115
Lindsay v. Gibbs	61, 355, 364	Lowe v. Copestake	274
Lingard v. Bromley	377, 387	Loyd, Ex parte	120
Lingen v. Simpson	339, 355, 451, 479	Lucas v. Beach	23,* 24, 567
Lingood v. Eade	454	— v. De la Cour	277
Lister, Ex parte	642, 644	— v. Wilkinson	226
Littledale, Ex parte	681	— v. Williams	604
Littles, Re	322, 706	Luckie v. Bushby	290
Littlewood v. Caldwell	544	— v. Forsyth	486
Liverpool Adelphi Loan Association v. Fairhurst	77	Luckombe v. Ashton	50, 51
Liverpool Borough Bank v. Turner	324	Luff v. Horner	333
— v. Walker	195, 257, 603, 604		

Luke v. South Kensington Hotel Co. . . . .	267	Magdalena Steam Navigation Co. v. Martin . . . . .	72, 191, 390
Lury v. Pearson . . . . .	453	Mahony v. East Holyford Mining Co. . . . .	166
Lyon v. Haynes 218,* 219, 565, 569, 586		Mainwaring v. Newman . . . . .	116, 567, 568, 569
— v. Knowles . . . . .	18, 54	Mair v. Glennie . . . . .	10, 19, 29*
— v. Tweddell . . . . .	69, 583	Malcolmson v. Malcolmson . . . . .	186
Lysaght v. Walker . . . . .	234	Manchester Bank, Ex parte . . . . .	337, 688, 699
Lyster v. Dolland . . . . .	341	— and County Bank, Ex parte . . . . .	716, 740
Lyth v. Ault . . . . .	241	— and Liverpool District Banking Co., Ex parte . . . . .	716
Maberly, Ex parte . . . . .	635	— and Milford Rail. Co. . . . .	545
McBirney v. Harran . . . . .	274	— Shef. & Lincoln Railway Co. v. Brooks . . . . .	294
Macbride v. Lindsay . . . . .	491	Manderston v. Robertson . . . . .	261
McClean v. Kennard . . . . .	19, 559	Mann's Case . . . . .	75
McConnell v. Hector . . . . .	73, 634	Manning v. Westerne . . . . .	227
McCrae, Re . . . . .	193, 597, 598	Mansell v. Feeney . . . . .	507, 508
MacDonald v. Richardson 461, 524, 530,* 612, 617		Mant v. Mainwaring . . . . .	88
McGae, Ex parte . . . . .	673*	March v. Ward . . . . .	187
McGillivray v. Simson . . . . .	292	Mardall v. Thelusson . . . . .	290
McGregor v. Bainbridge 49, 83, 84, 348, 350		Mare v. Charles . . . . .	186
Machel, Ex parte . . . . .	732	Mariott v. Shaw . . . . .	357
— v. Kinnear . . . . .	274	Marks, Ex parte . . . . .	433
MacIlreath v. Margetson . . . . .	382, 387	— v. Feldman . . . . .	629, 631
McIntyre v. Belcher . . . . .	436	Marlin, Ex parte . . . . .	695
— v. Miller . . . . .	225, 226	Marlow v. Pitfield . . . . .	191
McIver v. Humble . . . . .	85, 222	Marquand v. New York Manufacturing Co. . . . .	584
Mackay, Re . . . . .	454	Marsden v. Moore . . . . .	417
— v. Commercial Bank of New Brunswick . . . . .	163	Marsh, Ex parte . . . . .	120
McKay v. Rutherford . . . . .	81	— v. Keating 151, 155,* 157, 159, 165	
Mackenna, Ex parte (3 De G. F. & J.) . . . . .	119	Marshall v. Colman 301, 413, 466, 543, 580	
— (7 Jur. N. S.) . . . . .	715	— v. Maclure . . . . .	363
— v. Parkes . . . . .	67, 492	— v. Marshall . . . . .	571
Mackenzie, Ex parte . . . . .	640, 644	— v. Rutton . . . . .	77
McKewan's Case . . . . .	376	— v. Watson . . . . .	542
Mackey, Ex parte . . . . .	653	Marshfield, Re . . . . .	537
MacLae v. Sutherland . . . . .	130, 187	Marston, Ex parte . . . . .	739
Maclaren v. Stainton . . . . .	394	Martin's Case . . . . .	98
Maclean v. Dawson . . . . .	611	Martin, Ex parte . . . . .	683, 687
McLure v. Ripley . . . . .	304, 471, 485	— v. Crompe . . . . .	288, 341
McMahon v. Burchell . . . . .	59	— v. Heathcote . . . . .	509
— v. Upton . . . . .	463	— v. O'Hara . . . . .	639
McManus v. Crickett . . . . .	148	Martineau v. Cox . . . . .	503
M'Nair v. Fleming . . . . .	184	Martyn v. Gray . . . . .	42, 44, 45
McNeill's Case . . . . .	490	— v. Knowllys . . . . .	59, 562
M'Neill v. Reid . . . . .	559	Mason or Rawson, Ex parte (1 Rose, 428) . . . . .	641
McNellie v. Acton . . . . .	609, 610	Massam v. Thorley's Cattle Food Co. . . . .	114
McOwen v. Hunter . . . . .	386	Masson, Ex parte (1 Rose, 159) . . . . .	640, 746
McRae, Re . . . . .	613	— v. Bogg . . . . .	602
Maddeford v. Austwick 303, 304, 486			
Maddick v. Marshall . . . . .	42, 45		
Madgwick v. Wimble 433, 434, 553, 555, 573			

Masson v. Haddan . . . . .	452	Metcalf v. Rycroft . . . . .	112, 273
— v. Rumsey . . . . .	186	Metropolitan Saloon Omnibus	
Master v. Kirton . . . . .	491	Co. v. Hawkins . . . . .	278
Masterman, Ex parte . . . . .	681	Meyer, Ex parte . . . . .	169
Mather, Ex parte . . . . .	108	— v. Sharpe . . . . .	15, 328, 671
— v. Fraser . . . . .	629, 678	Meymott v. Meymott . . . . .	391
— v. Lay . . . . .	677	Michell v. Harris . . . . .	514
Mathers v. Green . . . . .	62	Middleton v. Pollock . . . . .	292, 662
Mathewman's Case . . . . .	78	Milburn v. Todd . . . . .	567
Mathews v. Aland . . . . .	729	Miles' Claim (9 Ch.) . . . . .	180, 182, 183*
Matson v. Swift . . . . .	Add. to p. 347	— Ex parte (2 Rose) . . . . .	645
Matthews, Ex parte . . . . .	40, 89, 637	— v. Thomas . . . . .	540, 571
Matthison v. Clark . . . . .	268	Milford v. Milford . . . . .	514, 520
Maturin v. Tredinnick . . . . .	490	Millar v. Craig . . . . .	389, 489,* 513, 514,
Maude, Ex parte (2 Ch.) . . . . .	721, 727,		516, 517, 537
	738, 742	Miller v. Douglas . . . . .	171
— (6 Ch.) . . . . .	403	— v. Mackay . . . . .	309, 311, 380
Maudsley v. Le Blanc . . . . .	87, 89	— v. Miller . . . . .	510
Maughan v. Sharpe . . . . .	93, 112	— v. Mynn . . . . .	299
Maund v. Allies . . . . .	413	Milliken v. Milliken . . . . .	433
Mavor, Ex parte . . . . .	633	Mills, Ex parte (6 Ch.) . . . . .	290
Mawman v. Gillett . . . . .	276	— (8 Ch.) . . . . .	36, 37
Maxwell v. Greig . . . . .	284	— v. Bennett . . . . .	632, 633*
— v. Hogg . . . . .	114	— v. Fowkes . . . . .	227
— v. Jameson . . . . .	374	— v. Hanson . . . . .	505
— v. Port Tennant Co. . . . .	476	Milne v. Bartlett . . . . .	579
May, Ex parte . . . . .	737	Milner, Ex parte . . . . .	642
— v. Smith . . . . .	223	Minchin, Ex parte (2 Gl. & J.) . . . . .	720
Mayberry v. Brooking . . . . .	113	— (Mont. & McAr.) . . . . .	754
Mayhew's Case . . . . .	366	Minnitt v. Lord Talbot . . . . .	50
Mayhew v. Eames . . . . .	141	— v. Whiney or Whitney . . . . .	170,
— v. Herrick . . . . .	61, 358, 562, 568,*		175, 215
	569, 676	Mitchell's Case (6 Ch.) . . . . .	260, 511
Mayou, Ex parte . . . . .	338, 698	— Ex parte (13 Ves.) . . . . .	624
Medewe's Trust . . . . .	230	— v. Cockburn . . . . .	97, 105
Megarey, Ex parte . . . . .	738	— v. Cullen . . . . .	226
Meggy v. Imperial Discount		— v. Lapage . . . . .	186, 286
Co. . . . .	756	— v. Reynolds . . . . .	437
Megrath v. Gray . . . . .	238	— v. Tarbutt . . . . .	198, 283
Meinhertzhagen, Ex parte . . . . .	254,	Moffatt v. Farquharson . . . . .	309, 326,
	704		460, 461
Melbourne, Ex parte . . . . .	646	— v. Van Millingen . . . . .	568, 569
Meliorucchi v. Royal Ex-		Moller v. Lambert . . . . .	112
change Assurance Co. . . . .	354	Molton v. Camroux . . . . .	76, 213
Mellersh v. Keen . . . . .	381, 440, 443,	Mollwo, March & Co. v. The	
	444, 527, 528, 571, 572, 579	Court of Wards . . . . .	2, 10, 17, 33,*
Melliss v. Shirley Local Board . . . . .	95		34, 35, 36, 38
Mellors v. Shaw . . . . .	149	Monkhouse v. Hay . . . . .	678
Mercantile Mutual Marine In-		Monro, Ex parte . . . . .	679
surance Co., Re . . . . .	708	Montetiere v. Lloyd . . . . .	118
Mercer, Ex parte . . . . .	627, 629, 654	Moody v. King . . . . .	741
Meredith, The . . . . .	380	Moon, Ex parte . . . . .	755
Merriman v. Ward . . . . .	229, 230, 235,	Moore, Ex parte . . . . .	738, 741
	597	— v. Barthrop . . . . .	653
Merryweather v. Nixan . . . . .	370, 377	— v. Davis . . . . .	10, 11
Mersey Steel and Iron Co. v.		Moor v. Hill . . . . .	287
Naylor & Co. . . . .	658	Morans v. Armstrong . . . . .	124, 135, 169
Mertens v. Haigh . . . . .	505	Moravia v. Levy . . . . .	564
Metcalf v. Bruin . . . . .	117	Morehouse v. Newton . . . . .	537

Moreton v. Hardern . . .	149	National Bank, Ex parte . . .	140
Morgan's Case or Morgan, Ex parte . . .	314	— Bolivian Navigation Co. v. Wilson . . .	576
Morgan v. Hardy . . .	708, 751	— Funds Assurance Co., Re . . .	200
— v. Knight . . .	639	— Permanent Benefit Building Soc. . .	191
— v. Marquis . . .	61, 212, 218, 568, 569, 672,* 676	Natusch v. Irving . . .	316,* 317,* 318,* 319
— v. Rowlands . . .	260	Navulshaw v. Brownrigg . . .	140
Morier, Ex parte . . .	659, 660	Naylor v. Mortimore . . .	645
Morison v. Moat . . .	415, 479, 543	Neale v. Turton . . .	116, 565, 567, 569
— v. Thompson . . .	307	Neave v. Avery . . .	562
Morley, Ex parte . . .	327, 337, 353, 699	Neilson v. Mossend Iron Co. . .	122, 410, 411, 413, 429, 571
— v. Baker . . .	564	Nelson v. Bealby . . .	340, 406
— v. Newman . . .	454	— v. Cherrell . . .	639
— v. Strombom . . .	271, 357	Nerot v. Burnand . . .	84, 323, 326,* 327, 353, 583, 588
— v. White . . .	599, 649	Nesbit v. Smith . . .	375
Morris, Ex parte (10 Jur.) . . .	623	Nesbitt v. Howe . . .	282
— (Mon.) . . .	753	Nettleship, Ex parte . . .	119
— v. Barrett . . .	322, 323, 331,* 341	Newbigging v. Adam . . .	369, 481, 484*
— v. Colman . . .	541,* 546	New Brunswick Railway Co. v. Muggeridge . . .	480
— v. Harrison . . .	512	Newell v. Townsend . . .	359, 542
— v. Kearsley . . .	344,* 479	Newen v. Wetten . . .	514, 520
— v. Livie . . .	364	Newland v. Champion . . .	613
— v. Morris . . .	490	Newman v. Jones . . .	149
Morrison, Ex parte . . .	315	Newmarch v. Clay . . .	229, 234
Morrow v. Saunders . . .	559	Newry & Enniskillen Railway Co. v. Coombe . . .	75
Morse v. Wilson . . .	16	— v. Moss . . .	584
Moss, Ex parte . . .	715	New Sombroero Phosphate Co. v. Erlanger . . .	480, 595, 596
Mosse v. Salt . . .	513	Newsome v. Coles . . .	43,* 45, 46, 217, 222, 588
Motion, Re . . .	649, 652	Newton v. Belcher . . .	88, 207
Moufflet v. Cole . . .	437	— v. Chantler . . .	628
Moulston v. Wire . . .	272	— v. Liddiard . . .	88
Mowatt and Elliott's Case or Mowatt, Ex parte . . .	386	— v. Taylor . . .	518
Moxon v. Bright . . .	458	New York Life Insurance Co. v. Statham . . .	72
Mulford v. Griffin . . .	213	Nicholas, Ex parte . . .	740
Mullett v. Hook . . .	281	Nicholls v. Diamond . . .	186
Mullins v. Collins . . .	149	— v. Dowding . . .	84, 86,* 128
Munnings v. Bury . . .	495	Nicholson v. Revill . . .	224
Munster v. Cox . . .	266, 272	— v. Ricketts . . .	125, 131, 182
— v. Railton . . .	266	Noke v. Ingham . . .	224
Munton, Ex parte . . .	639	Nokes, Ex parte . . .	571, 635
Murray v. Flavell . . .	85, 434, 435, 479	Nolan v. Fitzgerald . . .	272
— v. Moore . . .	272	Nolte, Ex parte . . .	732
— v. Pinkett . . .	584	Norfolk, Ex parte . . .	702, 732
— v. Somerville . . .	187	Norris v. Cottle . . .	24
— v. Walter . . .	503,* 504*	North British Insurance Co. v. Hallett . . .	680
Murtagh v. Costello . . .	346	Northumberland v. Todd . . .	117
Murton, Ex parte . . .	328, 633, 684, 700	Norton, Ex parte . . .	628, 629
Musgrave v. Drake . . .	169	— v. Cooper . . .	152
Musson v. May . . .	451, 591		
Mutton, Re . . .	751		
Mycock v. Beatson . . .	484*		
Myers v. Edge . . .	118		
— v. Willis . . .	147		
Nanson v. Gordon . . .	692, 722		
Nash, Ex parte . . .	636		
— v. Hodgson . . .	227		



Norton v. Russell . . . . .	517	Owen v. Wilkinson . . . . .	294
— v. Seymour . . . . .	86,* 89, 185*	Owston v. Ogle . . . . .	563
Norway v. Rowe . . . . .	469,* 475, 553*	Oxford Benefit Building Society, Re . . . . .	161, 199
Norwich & Lowestoft Co. v. Theobald . . . . .	222	Pachelor, Ex parte . . . . .	640, 645
— Yarn Co.'s Case, The . . . . .	375	Paddon v. Richardson . . . . .	618
Notley, Ex parte . . . . .	16, 564, 635*	Padstow Total Loss Association . . . . .	102
Nottidge v. Prichard . . . . .	225, 228, 236, 294	Page, Ex parte . . . . .	635, 729
Nottingham, Ex parte . . . . .	78, 701, 730	— v. Cox . . . . .	85, 433, 434,* 435 479
— Bank, Ex parte . . . . .	680	— v. Newman . . . . .	389
Nowell v. Nowell . . . . .	403	Paice v. Walker . . . . .	177, 180
Noyes v. Crawley . . . . .	509, 510,* 511	Paley v. Field . . . . .	228
Nutting, Ex parte . . . . .	680	Palliser v. Gurney . . . . .	78
Oakeley v. Pasheller . . . . .	248, 251,* 254, 450, 597	Palmer's Case (1 Mer.) . . . . .	250, 253, 596
Oakes v. Turquand . . . . .	480	Palmer, Re (2 A. & E.) . . . . .	101
Oakford v. European and American Steamship Co. . . . .	244,* 252, 253	— v. Justice Assurance Society . . . . .	137
O'Brien v. Cooke . . . . .	541	— v. Mallet . . . . .	437
Ockenden, Ex parte . . . . .	658	— and Add. to p. 267	
Odell v. Cormack . . . . .	Add. to p. 180	— v. Mitchell . . . . .	523, 615, 617
Official Receiver, Ex parte, Re Gould . . . . .	Add. to p. 628	Panama & South Pacific Tel. Co. v. India Rubber Co. . . . .	481
Ogilvy, Ex parte . . . . .	737	Pannell v. Hurley . . . . .	162
Ogle, Ex parte . . . . .	720	Pardo v. Bingham . . . . .	258
Oldaker v. Lavender . . . . .	377, 407, 421	Pare v. Clegg . . . . .	92, 260, 464
Oldfield v. Preston . . . . .	594	Pariente v. Lubbock . . . . .	113, 117
Olive v. Smith . . . . .	656	Parker, Ex parte (Cooke's B. L.) . . . . .	695, 721
Oliver v. Hamilton . . . . .	546	— (2 M. D. & D.) . . . . .	208, 706
Olknow, Ex parte . . . . .	729	— v. Bloxham . . . . .	514, 618
O'Mealey v. Wilson . . . . .	73	— v. Gossage . . . . .	425
Omychund v. Barker . . . . .	390	— v. Hills . . . . .	307, 329
Ord, Ex parte . . . . .	683	— v. McKenna . . . . .	200, 306
— v. Portal . . . . .	274, 285	— v. Morrell . . . . .	129
O'Reardon, Ex parte . . . . .	640,* 641	— v. Pistor . . . . .	357, 359
O'Reilly v. Richardson . . . . .	180	— v. Ramsbottom . . . . .	573, 741
Oriental Banking Co. v. Coleman . . . . .	627	— v. Wells . . . . .	508
Oriental & Commercial Bank, Re . . . . .	374, 375	Parkes, Ex parte . . . . .	636
— Financial Corporation, Ex parte . . . . .	255	Parkin v. Carruthers . . . . .	214, 221
Orr v. Chase . . . . .	137, 194, 283, 596	Parkinson v. Hanbury . . . . .	514
Osborne v. Jullion . . . . .	20	Parr, Ex parte (4 D. & Ch.) . . . . .	120
— v. Harper . . . . .	564	— (18 Ves.) . . . . .	644
— v. Harpur . . . . .	566	— (1 Rose) . . . . .	715
Oswald v. Thompson . . . . .	631	Parry, Ex parte . . . . .	681
Other v. Iveson . . . . .	193, 196	Parsons v. Hayward . . . . .	517, 527, 571
Ottley v. Browne . . . . .	108*	Part, Ex parte . . . . .	695
Owen, Ex parte (4 De G. & Sm.) . . . . .	328, 329,* 334, 337, 790	Pascoe v. Swan . . . . .	59
— (13 Q. B. D.) . . . . .	626, 634, 669, 670	Patent File Co. . . . .	140
— v. Body . . . . .	30	Paterson v. Gandasequi . . . . .	177
— v. Delamere . . . . .	47, 606, 609	— v. Zachariah . . . . .	215
— v. Homan . . . . .	255	Patten v. Rea . . . . .	148
— v. Van Uster . . . . .	87, 186*	Pawsey v. Armstrong . . . . .	10, 14, 330, 385,* 443, 555, 558
		Payler v. Homersham . . . . .	238
		Payne, Ex parte (De Gex) . . . . .	635
		— (11 Ch. D.) . . . . .	627
		— v. Hornby . . . . .	326, 353, 588, 632

Paynter v. Houston . . . . .	601, 612	Phelps v. Lyle . . . . .	274, 276
Peaceable v. Read . . . . .	562	— v. Prothero . . . . .	275
Peacock, Ex parte . . . . .	716	— v. Sproule . . . . .	516
— v. Peacock 84, 217, 301, 348, 349, 540, 551, 552, 571		Phelps, Stokes & Co. v. Com- ber . . . . .	711
Peake, Ex parte (1 Mad.) 335, 336, 485, 486, 573, 698		Phené v. Gillan . . . . .	374
— (2 Rose) . . . . .	732	Philips v. Atkinson . . . . .	542, 549
Pearce v. Chamberlain 363, 433, 590, 591		— v. Knightley . . . . .	454
— v. Lindsay . . . . .	572	— v. Philips . . . . .	284, 342
— v. Slocombe . . . . .	720	Phillips, Ex parte . . . . .	681, 682
Pearl v. Deacon . . . . .	228	— v. Clagett . . . . .	145,* 146
Pearson, Ex parte . . . . .	629	— v. The Commissioners of Inland Revenue . . . . .	450
— v. Pearson . . . . .	440	— v. Homfray . . . . .	595
— v. Scott . . . . .	136	— v. Hopwood . . . . .	639
— v. Skelton . . . . .	378, 566	— v. Hunter . . . . .	676
Pease v. Hewitt . . . . .	68, 69, 581	— v. Phillips (1 M. & K.) . . . . .	331,
— v. Hirst . . . . .	117, 227, 274	332,* 344,* 347	
Peat, Ex parte . . . . .	642	— v. Phillips (Finch) . . . . .	616
— v. Jones . . . . .	658	— v. Phillips (3 Hare) . . . . .	134
Pedder v. Mayor of Preston 290		— v. Ward . . . . .	255
Pedgrift v. Chevallier . . . . .	99	Phillpotts v. Jones . . . . .	227
Peek v. Gurney . . . . .	410, 480, 595	Philps v. Hornstedt . . . . .	629
Peel v. Thomas . . . . .	90	Phipps, Ex parte . . . . .	636
Peele, Ex parte 190, 208, 703, 705		Phoenix Life Insurance Co., The . . . . .	316
Peirse v. Bowles . . . . .	136	Phosphate of Lime Co. v. Green . . . . .	149
Pelly v. Wathen . . . . .	120	Phosphate Sewage Co. v. Hartmont . . . . .	490
Pemberton, Ex parte (1 M. D. & D.) . . . . .	640	Pickard v. Sears . . . . .	40
— Ex parte (1 Deac.) . . . . .	687	Pickering's Case . . . . .	177
— v. Oakes . . . . .	118, 230, 234	Pickering v. Pickering 502, 537	
Penkivil v. Connell . . . . .	188*	— v. Rigby . . . . .	503
Pennell v. Dawson . . . . .	629	Pidgeon v. Burslem . . . . .	97
— v. Deffel . . . . .	162, 228	Piercy v. Fynney . . . . .	136, 267, 270,
— v. Reynolds . . . . .	629	294	
— v. Walker . . . . .	453	— v. Young . . . . .	453
Penney v. Goode . . . . .	504	Pigott v. Bagley . . . . .	433
Penny v. Pickwick . . . . .	475	Pie v. Pile . . . . .	439
Penoyer v. Brace . . . . .	298	Pillans v. Harkness 369, 482,* 517	
Perens v. Johnson 303, 304, 360,* 391, 493		Pilley v. Robinson Add to p. 264	
Perfect, Ex parte . . . . .	713	Piling v. Piling 339, 334, 390, 409	
Perring v. Hone 130, 567, 568, 569		Pim v. Harris . . . . .	389
Perrott v. Bryant . . . . .	19	— v. Wilson . . . . .	636
Perry v. Barnett . . . . .	370, 372	Pinckney v. Hall . . . . .	129
— v. Jackson . . . . .	258	Pinder v. Wilks . . . . .	218
— v. Walker . . . . .	636	Pine, Ex parte . . . . .	721
Peter v. Rich . . . . .	376	Pinkerton, Ex parte . . . . .	732
Peters v. Anderson . . . . .	226, 227	Pinkett v. Wright 584, 652, 680	
Petre v. Petre . . . . .	260	Pitt v. Cholmondeley . . . . .	513
Petrie v. Hannay . . . . .	105	Plews v. Baker . . . . .	453
Pettman v. Keble . . . . .	372	Plowden, Ex parte . . . . .	741
Petty v. Smith . . . . .	272	Plumer v. Gregory 132, 151, 156,* 250, 284	
Pettyt v. Janeson 408, 409, 420, 430,* 573		Plummer, Re . . . . .	716
Pharmaceutical Soc. v. The London and Provincial Sup- ply Assoc. . . . .	6, 98, 99	Pointon v. Pointon . . . . .	612
		Pollexfen v. Sibson . . . . .	266
		Ponton v. Dunn . . . . .	434,* 435

Poole, Ex parte . . . . .	642	Radenhurst v. Bates . . . . .	285, 457, 563
Pooley v. Driver . . . . .	4, 10, 11, 12, 16, 17, 33, 34, 35, 36, 38*	Raikes v. Todd . . . . .	228
Pope v. Haman . . . . .	357	Raleigh, Ex parte . . . . .	254, 704, 706
Popple v. Sylvester . . . . .	255	Ralph v. Harvey . . . . .	87, 89
Poppleton, Ex parte . . . . .	102	Ramazotti v. Bowring . . . . .	295
Pordage v. Cole . . . . .	416*	Ramsbotham v. Cator . . . . .	673
Porter v. Lopes . . . . .	59	Ramsbottom v. Duck . . . . .	673
— v. Taylor . . . . .	134	— v. Lewis . . . . .	667, 673
Porthouse v. Parker . . . . .	141	— v. Parker . . . . .	485, 486
Portland, The . . . . .	73	Ramskill v. Edwards . . . . .	377, 707
Pott v. Eyton . . . . .	28, 30,* 43, 89	Randall v. Randall . . . . .	343,* 346, 347
Potter v. Commissioners of Inland Revenue . . . . .	439, 450	— v. Raper . . . . .	374
— v. Jackson . . . . .	402, 518	Randegger v. Holmes . . . . .	453
Potts v. Bell . . . . .	72	Randell, Saunders & Co. v. Thompson . . . . .	452
Poulson, Ex parte . . . . .	161, 162, 702	Randleson, Ex parte . . . . .	228
Powdrell v. Jones . . . . .	419*	Ranelagh v. Hayes . . . . .	375
Powell, Ex parte . . . . .	753	— and Add. to p. 375	
— v. Head . . . . .	62	— v. Melton . . . . .	424
— v. Layton . . . . .	280	Ransford v. Copeland . . . . .	96
Powis v. Harding . . . . .	491	Rapp v. Latham . . . . .	146, 164,* 165
Powles v. Page . . . . .	141	Rasbotham v. Shropshire Union Railway Co. . . . .	503
— v. Hargreaves . . . . .	713	Rathbone v. Drakeford . . . . .	272
Prance v. Sympton . . . . .	260, 509, 511	Ravenscroft, Ex parte . . . . .	641, 612
Prendergast v. Turton . . . . .	469,* 470, 475	Rawbone, Re . . . . .	679
Prentice v. Prentice . . . . .	557	Rawlings v. Lambert . . . . .	592
Prescot, Ex parte (1 Atk.) . . . . .	658	Rawlins v. Wickham . . . . .	257, 369, 483*
Prescott, Ex parte (Mon. & Ch.) . . . . .	739	Rawlinson v. Clarke . . . . .	13, 563
— (4 D. & C.) . . . . .	714	— v. Moss . . . . .	120
Preston v. Strutton . . . . .	543, 564, 565	Rawson, Ex parte (1 V. & B.) . . . . .	640
Price, Ex parte . . . . .	659	— (1 Rose) . . . . .	641
— v. Barker . . . . .	237	— (Jac.) . . . . .	721, 724, 737
— v. Groom . . . . .	21,* 30, 681	— v. Samuel . . . . .	291, 543
— v. Hewitt . . . . .	74	Rawstone v. Parr . . . . .	193, 196
— v. Moulton . . . . .	255	Ray v. Davies . . . . .	289, 647
Prickett v. Down . . . . .	668	Raymond's Case . . . . .	460, 493
Priestly v. Pratt . . . . .	677, 679, 682	Raynard v. Chase . . . . .	95
Primrose v. Bromley . . . . .	194	Read, Ex parte . . . . .	718
Pritchard v. Draper . . . . .	128, 225	— v. Anderson . . . . .	371
Pritt v. Clay . . . . .	513, 516	— v. Bailey . . . . .	734
Professional Life Assurance Co. . . . .	377	— and Add. to p. 143	
Prole v. Masterman . . . . .	382, 495*	— v. Bowers . . . . .	542, 547
Proudfoot, Ex parte . . . . .	639	Reade v. Bentley . . . . .	14, 122*
Puller v. Roe . . . . .	296	— v. Woodrooffe . . . . .	508
Pulling v. Tucker . . . . .	631	Redgrave v. Hurd . . . . .	163, 481
Pulsford v. Richards . . . . .	480, 481	Redmayne v. Forster . . . . .	364, 366, 461, 494, 498
Punnett, Ex parte . . . . .	439	Redpath v. Wigg . . . . .	30
Quartermaine v. Bittleston . . . . .	677	Redway v. Sweeting . . . . .	51
Quincey v. Sharp . . . . .	260	Reed and Bowen, Ex parte . . . . .	754
Quintin, Ex parte . . . . .	655, 660	— and Steele, Ex parte . . . . .	629
Raba v. Ryland . . . . .	140	— v. White . . . . .	243, 248,* 253, 255
Rackstraw v. Imber . . . . .	564	Reese River Mining Co. v. Smith . . . . .	491
Radcliffe v. Rushworth . . . . .	13, 88	Reeve, Ex parte . . . . .	720, 721, 728, 742
		— v. Whitmore . . . . .	537
		Reid's Case (24 Beav.) . . . . .	12
		Reid, Ex parte (2 Rose) . . . . .	795, 728

Reid v. Hollinshead	13, 49, 53, 140	Ricketts v. Bennett	127, 132, 133, 190
— v. Langlois	. . . 504	Ridgway v. Clare	. . . 599, 601*
Reilly v. Walsh	304, 341, 471*	— v. Philip	. . . 49, 88*
Rennick, Ex parte	. . . 645	Ridler, Re	. . . 654
Rensburg, Ex parte	. . . 670	Ridley v. Taylor	. . . 169, 172
Revell, Ex parte	. . . 708	Ridout v. Brough	. . . 659
R. v. Arnaud	. . . 323	Rigden v. Pierce	. . . 429, 555
— v. Atkinson	. . . 457	Right v. Cuthell	. . . 139
— v. Bren	. . . 457	Ring, Ex parte	. . . 725
— v. Burgess	. . . 457	Ripley v. Waterworth	. . . 344*
— v. Collector of Customs	342	Rishton v. Grissell	390, 393, 493, 555
— v. Essex	. . . 372	Roberts, Ex parte	. . . 640
— v. Evans	. . . 457	— v. Eberhardt	56, 57, 331, 545,* 550, 552, 580
— v. Fox	. . . 100	— v. Hardy	. . . 73
— v. Frankland	. . . 103	— v. Kuffin	. . . 514
— v. Gaby	. . . 288	Robertson v. Lockie	425, 572, 579
— v. Hodge	. . . 340	— v. Quiddington	439, 445, 619
— v. Leech	. . . 147	— v. Southgate	. . . 388, 459
— v. Loose	. . . 457	Robey & Co.'s Perseverance	
— v. Macdonald	13, 495	Iron Works v. Ollier	. . . 711
— v. Manning	. . . 147	Robinson (Executors') Case (6	
— v. Marsh	. . . 457	De G. Mc. & G.)	367, 377, 385, 386
— v. Proud	. . . 457	— Ex parte (3 D. & C. and	
— v. Robson	2, 50, 457	1 M. & A.)	667, 668, 673*
— v. Rock	. . . 340	— (4 D. & C.)	. . . 737
— v. St. Martin's	. . . 117	— v. Alexander	259, 508, 509, 591
— v. Sanderson	. . . 340	— v. Anderson	49, 84, 349, 350,* 380, 478
— v. Scott	. . . 288	— v. Ashton	. . . 329
— v. Smith	. . . 457	— v. Davison	. . . 419
— v. Stainer	. . . 91	— v. Field	. . . 508
— v. Stranyforth	. . . 149	— v. Hadley	. . . 549
— v. Warburton	. . . 457	— v. Hofman	. . . 137
— v. Webster	. . . 457	— v. Kitchin	. . . 97
— v. Whitmarsh	50, 93	— v. MacDonnell	. . . 678
Reynell v. Lewis	. . . 44, 89	— v. Marchant	. . . 279
Reynolds v. Bowley	. . . 690,* 691	— v. Preston	. . . 51
— v. Bridge	. . . 433, 455	— v. Thompson	. . . 314, 512
Rheam v. Smith	. . . 501, 543	— v. Wilkinson	178, 245, 253, 281
Rhodes v. Forwood	. . . 436	Robley v. Brooke	. . . 323, 350
— v. Rhodes	. . . 391*	Robson v. Curtis	. . . 567
— v. Smethurst	. . . 259	— v. Drummond	. . . 276, 287*
Rice v. Gordon	488, 489,* 597, 600, 601	— v. McCreight	. . . 495
Richards v. Davies	. . . 497	Rock v. Lazarus	. . . 113
— v. Heather	. . . 288	— v. Mathews	. . . 552
Richardson, Ex parte (3 Deac. & Ch.)	. . . 635*	Rodgers v. Maw	240, 252, 450
— (Buck. 202; 3 Madd.)	699, 707	Roe v. Galliers	. . . 678
— (Mon. & Ch.)	. . . 680	Rogers v. Harvey	. . . 348
— (Buck, 480)	. . . 682	— v. Mackenzie	. . . 695
— v. Bank of England	111, 115, 401, 402, 505, 568	— v. Price	. . . 373
— v. Gooding	. . . 647	Rolfe v. Flower	208, 249, 706
— v. Hastings	460, 461, 462, 463, 499	Rooke v. D'Avigdor	. . . 457, 492
— v. Horton	. . . 196	Rooth v. Quin	170, 210, 222, 702
— v. Larpent	. . . 463		
Riches, Re	. . . 129, 171, 172		
Richmond v. Heapy	. . . 268, 269		

Rose, Ex parte . . . . .	680	Sanders v. King . . . . .	507
— v. Hart . . . . .	658*	Sanderson v. Brooksbank . . . . .	169
Ross, Ex parte . . . . .	658, 660	Sandford v. Ballard . . . . .	58, 59
— v. Parkyns . . . . .	10, 13	Sandilands v. Marsh . . . . .	138*
Rothwell v. Humphries . . . . .	131	Sangster v. Mazarredo . . . . .	87, 89, 128
Routh v. Peach . . . . .	454, 515	Sargant v. Read . . . . .	548, 550, 553
— v. Webster . . . . .	446, 544	Saul v. Browne . . . . .	507, 508
Rowe v. Wood . . . . .	56, 301, 404, 518, 550, 553*	Saunders v. Druce . . . . .	611
Rowland and Crankshaw, Re . . . . .	690, 700	Saville v. Robertson . . . . .	204,* 205
Rowlands v. Evans . . . . .	425, 552, 553,* 555, 556, 557, 558,* 578,* 591	Savin, Re . . . . .	720
Rowlandson, Ex parte (1 Rose, 89) . . . . .	28, 30, 640, 642	Sawyer v. Goodwin Add. to p. 163	
— (1 Rose, 416, and 2 V. & B. 172) . . . . .	334, 338, 698	Sayer v. Bennet . . . . .	577, 578, 579
— (3 P. & W. 405) . . . . .	743, 744, 746	Scarf v. Jardine . . . . .	40, 42, 46,* 47, 197,* 211, 221, 256, 286, 702, 706
Rowley v. Adams . . . . .	328, 347, 488, 537, 612	Scarth, Ex parte . . . . .	678
— v. Horne . . . . .	222	Schofield, Ex parte . . . . .	714, 718
Roxburghe v. Cox . . . . .	297	Scholefield v. Heafield . . . . .	591
Royal Bank of Scotland v. Commercial Bank of Scot- land . . . . .	712	Scholey v. Central Rail. Co. of Venezuela . . . . .	490
Ruffin, Ex parte . . . . .	334, 335, 336,* 352, 587, 697,* 698	Scott v. Avery . . . . .	452
Rule v. Jewell . . . . .	470,* 472, 473, 475	— v. Beale . . . . .	209, 230, 231
Rumboll, Ex parte . . . . .	649	— v. Franklin . . . . .	289
Ruppell v. Roberts . . . . .	144, 178	— v. Godwin . . . . .	573
Russell, Ex parte (19 Ch. D. 588) . . . . .	654	— v. Izon . . . . .	609, 723
— Re (19 Ch. D. 432) . . . . .	620	— v. McIntosh . . . . .	567
— v. Austwick . . . . .	310,* 311	— v. Miller . . . . .	100
— v. Pellegrini . . . . .	453	— v. Milne . . . . .	467
— v. Reece . . . . .	177	— v. Rayment . . . . .	476
— v. Russell . . . . .	426, 453, 487, 575	— v. Surman . . . . .	162
Russell's Patent . . . . .	62	Scudemore v. White . . . . .	509
Rutherford, Ex parte . . . . .	695, 720	Sculthorpe v. Tipper . . . . .	612
Ryall v. Larkin . . . . .	659	Seddon, Ex parte . . . . .	254, 704
— v. Rowles . . . . .	354, 655, 677, 678, 679, 682, 684	— v. Connell . . . . .	462, 463, 501
Ryan, Re . . . . .	341	Sedgwick's Case (or Ex parte) . . . . .	382, 386
— v. Mackmath . . . . .	214	— v. Daniell . . . . .	566
Ryhope Coal Co. v. Foyer . . . . .	5	Sedgworth v. Overend . . . . .	278, 279
Sadler, Ex parte . . . . .	731	Seeley v. Boehm . . . . .	494, 502
— v. Lee 77,* 153,* 161, 577, 596		Seligmann v. Le Boutillier . . . . .	453
— v. Nixon . . . . .	566	Selkrig v. Davies . . . . .	719
Saffery, Ex parte . . . . .	629, 630, 632	Selwyn v. Harrison . . . . .	374
St. Aubyn v. Smart . . . . .	151, 152, 159	Senhouse v. Christian . . . . .	468,* 469, 473, 475
St. Barbe, Ex parte . . . . .	726, 736	Seroka v. Kattenburg . . . . .	78
St. James' Club . . . . .	50	Sewell v. Bridge . . . . .	516
Saint v. Ferguson . . . . .	455	Seymour v. Bridge . . . . .	371
Salomons v. Nissen . . . . .	141, 267	Shack v. Anthony . . . . .	255
Salting, Ex parte . . . . .	661, 718*	Shackell v. Rosier . . . . .	370
Saltoun v. Houstoun . . . . .	451	Shackle v. Baker . . . . .	440
Sammon, Ex parte . . . . .	715	Shakeshaft and others, Ex parte . . . . .	722*
Sander v. Sander . . . . .	578	Shakespeare, Re . . . . .	78
		Shallcross v. Oldham . . . . .	309
		Shanks v. Klein . . . . .	341
		Sharon Coal Corp. v. Fulton Bank . . . . .	79
		Sharp, Ex parte . . . . .	641, 642
		— v. Milligan . . . . .	139
		— v. Taylor . . . . .	91, 107,* 108

Sharp v. Warren . . . . .	568	Sims v. Bond . . . . .	275
Sharpe v. Cummings . . . . .	52, 349	— v. Britain . . . . .	275
— v. Gibbs . . . . .	255	— v. Brutton . . . . .	151, 156,* 157, 159, 165
Sharpley v. Louth & East Coast Railway Co. . . . .	490	Simson v. Cooke . . . . .	118
Shaw, Ex parte . . . . .	707	— v. Ingham . . . . .	227, 232*
— v. Benson . . . . .	102, 103	Sinclair, Re . . . . .	665
— v. Ching . . . . .	508	— v. Wilson . . . . .	630, 681
— v. Galt . . . . .	13, 32*	Singer's Man. Co. v. Wilson . . . . .	114
— v. Harvey . . . . .	87	— v. Loog . . . . .	114
— v. Picton . . . . .	389	Skaife v. Jackson . . . . .	270
Sheehan v. Great East. Rail. Co. . . . .	62	Skeet v. Lindsay . . . . .	511
Sheen, Ex parte . . . . .	690, 742	Skinner v. Stocks . . . . .	276, 277
Sheffield Gas, etc. Co. v. Harrison . . . . .	476	Skipp v. Harwood . . . . .	340, 352, 359
Sheil, Ex parte . . . . .	37	Skirving v. Williams . . . . .	615
Shelley, Re . . . . .	680	Slater, Ex parte . . . . .	224, 703
Sheldon v. Rothschild . . . . .	657	— v. Lawson . . . . .	262
Shepherd, Ex parte . . . . .	716	— v. Willis . . . . .	324
— v. Allen . . . . .	579	Sleech's Case . . . . .	161, 194, 200, 250, 253, 596, 597, 602, 752
Sheppard, Ex parte (19 Q. B. D.) . . . . .	200, 745, 749	Slee, Re . . . . .	682
— (Mon. & Bl.) . . . . .	695	Slim v. Croucher . . . . .	481
— v. Baillie . . . . .	280	Slipper v. Stidstone . . . . .	291, 341
— v. Oxenford . . . . .	107,* 463, 499,* 500, 546,* 551, 552	Small v. Attwood . . . . .	162, 464, 480
Sheriff of Middlesex, Ex parte . . . . .	649	Smallcombe v. Olivier . . . . .	643
Sherman v. Sherman . . . . .	467	Smart, Ex parte . . . . .	713
Sherry, Re . . . . .	227, 230	Smith's Case (4 Ch.) . . . . .	98
Shipton v. Thornton . . . . .	187*	Smith, Ex parte (Buck) . . . . .	681, 741
Sherrill v. Wilks . . . . .	173,* 209	— (4 Deac. & Ch.) . . . . .	683
Showler v. Stoakes . . . . .	135, 272	— (1 Gl. & J. 74, and 6 Madd. 2) . . . . .	734, 738
Shrubsole v. Sussams . . . . .	629, 679	— (1 Gl. & J. 256) . . . . .	640, 747*
Sibley v. Minton . . . . .	463	— (3 Madd.) . . . . .	328, 681
Sibson v. Edgeworth . . . . .	463	— (2 Mon. & A.) . . . . .	695
Sichel v. Mosenthal . . . . .	476	— (1 M. D. & D.) . . . . .	706
Siddall, Re . . . . .	50	— (2 Rose) . . . . .	733
Siebert v. Spooner . . . . .	627	— (14 Q. B. D.) . . . . .	725
Siffkin v. Walker . . . . .	187	— (5 Ves.) . . . . .	583, 638, 648
Sillitoe, Ex parte . . . . .	721,* 725, 726, 727, 734, 736	— v. Anderson . . . . .	5, 101, 102
Silver v. Barnes . . . . .	50	— v. Ayres . . . . .	607
Sim v. Sim . . . . .	512	— v. Baily . . . . .	129, 188
Simmons, Re . . . . .	644	— v. Ball . . . . .	112
— v. Leonard . . . . .	409, 429, 431,* 573	— v. Barrow . . . . .	564, 567
— v. Swaine . . . . .	454	— v. Braine . . . . .	169
Simms v. Barry . . . . .	195	— v. Cannan . . . . .	628
Simons v. Johnson . . . . .	238	— v. Chadwick . . . . .	480, 481, 482
Simpson, Re (9 Ch.) . . . . .	337, 698, 699	— v. Craven . . . . .	190, 203
— Ex parte (De Gex) . . . . .	631	— v. De Silva . . . . .	352, 354, 648
— Claim (36 Ch. D.), Add. to . . . . .	pp. 126, 138	— v. Duke of Chandos . . . . .	408, 536
— v. Chapman . . . . .	461, 524, 532,* 617, 619*	— v. Everett . . . . .	440, 443, 444, 488, 527, 614, 616
— v. Henning . . . . .	238, 251, 748	— v. Fromont . . . . .	544
— v. Vaughan . . . . .	194, 596	— v. Goddard . . . . .	672
— v. Westminster Palace Hotel Co. . . . .	314	— v. Harrison . . . . .	360
		— v. Howth . . . . .	562
		— v. Jameson . . . . .	161, 240
		— v. Jarves . . . . .	188
		— v. Jeyes . . . . .	406,* 466, 542, 543, 546, 551, 580

Smith v. Johnson . . . .	131	Stables v. Eley . . . .	47,* 89, 149, 214
— v. Leveaux . . . .	458	Stackwood v. Dunn . . .	296
— v. Lindo . . . .	97	Staddon, Ex parte . . .	657, 662*
— v. Mawhood . . . .	95	Stahlschmidt v. Lett . . .	387
— v. Mules . . . .	331, 415, 428,* 558	Stainbank v. Feanley . . .	482
— v. Oriell . . . .	218, 569, 671, 672	Stainton v. Carron Co. . .	384, 488,
— v. Parkes . . . .	292,* 364	511,* 513, 537, 611,* 613	
— v. Plummer . . . .	355	Stanborough, Ex parte . . .	704
— v. Smith (3 Giff.) . . .	194, 620*	Stanger v. Wilkins . . .	627, 628
— (5 Ves.) . . . .	323, 325, 329	Staniforth v. Fellowes . . .	659
— v. Snow . . . .	460	Stansfeld v. Cubitt . . .	679, 681
— v. Stokes . . . .	218, 340, 569, 671,	— v. Levy . . . .	288
	672	Stanton, Ex parte . . . .	711
— v. Timms . . . .	627	Stanton Iron Co., Re . . .	30
— v. Topping . . . .	681, 682	Staples, Re . . . .	208
— v. Watson . . . .	15, 28, 36, 49, 135,	Stavers v. Curling . . .	19, 416, 563
	328	Stead v. Salt . . . .	129
— v. Wigley . . . .	229	Stedman v. Smith . . . .	562
— v. Winter . . . .	215,* 219, 220	Steel v. Lester . . . .	14, 34, 149
Smout v. Ilbury . . . .	211	Steele v. Stuart . . . .	141
Smyth, Ex parte . . . .	716, 750	Steer v. Crowley . . . .	450
Snaith v. Burridge . . . .	172	Steiglitz v. Eggington . . .	137
Snape, Ex parte . . . .	739	Stephens, Ex parte . . .	654, 661,* 662
Sneyds, Ex parte . . . .	633	— v. Brown . . . .	729
Snook v. Watts . . . .	76	— v. Reynolds . . . .	129, 181*
Snowball, Ex parte . . .	632, 664, 665	Stephenson v. Chiswell . . .	597
Snowdon, Ex parte . . . .	375	Sterndale v. Hankinson . . .	228, 229
Soames, Ex parte . . . .	660	Sterry v. Clifton . . . .	92, 100
Société Générale de Paris v.		Steuart v. Gladstone . . .	402, 421, 426,
Green . . . .	714	428, 430, 444, 448, 575	
— v. Tramways Union Co. .	680	Stevens v. Benning . . .	114, 288*
Society of Practical Knowl-		— v. Cook . . . .	390, 391
edge v. Abbott . . . .	496	— v. South Devon Railway	
Solly v. Forbes . . . .	237*	Co. . . .	314, 352, 393
Solomon, Ex parte . . . .	714, 746	Steward v. Blakeway . . .	55, 56, 331,
— v. Medex . . . .	279	334, 343, 346,* 347	
Solvency Mutual Guarantee		— v. Harkness . . . .	482
Co. v. Freeman . . . .	118	Stewart v. Forbes . . . .	349, 350
Somerville v. Mackay . . .	311, 508	— v. Gibson . . . .	93, 106
Somes v. Currie . . . .	409	Stewart's Case . . . .	536
South Carolina Bank v. Case	182	Stocken v. Dawson . . .	352, 353, 381,
South Sea Co. v. Wymondsell	260	384, 489,* 528, 617, 688	
South Wales Atlantic Steam-		Stocker v. Brocklebank . . .	13, 14, 563
ship Co. . . .	103	— v. Wedderburn . . . .	476
Southwell v. Bowditch . . .	180	Stokes v. Lewis . . . .	370, 373
Spackman v. Miller . . . .	682	Stone, Ex parte (8 Ch.) . . .	748
Spark v. Heslop . . . .	374	— Re (33 Ch. D.) . . . .	36, 37
Sparrow, Ex parte . . . .	629, 631	— v. Marsh . . . .	155,* 157
Spears v. The Lord Advocate	340	Stonehouse v. De Silva . . .	289, 638
Spenceley v. Greenwood . . .	215, 244	Stoveld, Ex parte . . . .	670
Spencer v. Billing . . . .	89	— v. Eade . . . .	234
— v. Harrison . . . .	348	Stracey v. Deey . . . .	295*
— v. Spencer . . . .	515*	Strachan v. Barton . . . .	630
Spittal v. Smith . . . .	486*	Strang, Ex parte . . . .	657
Spottiswoode's and Amsink's		Strange v. Lee . . . .	118
Case . . . .	367, 369	Strangford v. Green . . . .	129
Sprague, Ex parte . . . .	336, 337, 680,	Streatfield, Lawrence & Co.,	
	686,* 700	Re . . . .	330*
Spurr v. Cass . . . .	276	Street v. Rigby . . . .	451

Strelley v. Winson . . . . .	60, 62	Taylor v. Bowers . . . . .	106, 107
Strickland v. Symons . . . . .	606, 607,*	— v. Crowland Gas & Coke	
Strong v. Harvey . . . . .	609, 610	Co. . . . .	95
Strother v. Willan . . . . .	51	— v. Davis . . . . .	404, 420, 542
Stroud v. Gwyer . . . . .	85	— v. Dean . . . . .	495
Strutte, Ex parte . . . . .	162, 521, 524,	— v. Fields . . . . .	340, 359, 647
Stuart v. Lord Bute . . . . .	531, 618	— v. Hare . . . . .	65
— v. Ferguson . . . . .	695	— v. Haylin . . . . .	514
Stubbs v. Sargon . . . . .	404, 503, 504	— v. Kymer . . . . .	234
Studdy v. Saunders . . . . .	698	— v. Lendey . . . . .	106
Stupart v. Arrowsmith . . . . .	112, 113	— v. Midland Railway Co. . . . .	267,
Sturgis v. Darell . . . . .	87, 89		270
Sturt v. Mellish . . . . .	467, 512	— v. Plumer . . . . .	162
Sturton v. Richardson . . . . .	259	— v. Rundell (11 Sim. & Cr.	
Styan, Ex parte . . . . .	467	and Ph.) . . . . .	503
Sully, Ex parte . . . . .	560	— (1 Y. & C. C. C. and 1 Ph.) . . . . .	503
— v. A.-G. . . . .	681	— v. Salmon . . . . .	464
Sumner v. Powell . . . . .	680	— v. Shaw . . . . .	512
Sutton v. Clarke . . . . .	394	— (L. J. James, 7th March,	
— v. Gregory . . . . .	196,* 595	1873) . . . . .	342
— v. Tatham . . . . .	283	Teague v. Hubbard . . . . .	567, 569
Swan v. Bank of Scotland . . . . .	129, 169	Teasdale v. Sanderson . . . . .	59, 60
— v. Steele . . . . .	371, 372	Teed v. Elworthy . . . . .	295
Swift v. Jewsbury . . . . .	95	Telegraph Despatch Co. v.	
— v. Winterbotham . . . . .	169, 181*	McLean . . . . .	436
Swindell v. Bulkeley . . . . .	138, 165, 179	Telford v. Ruskin . . . . .	502, 503
Swire v. Francis . . . . .	179	Tempest, Ex parte . . . . .	629, 630
— v. Redman . . . . .	259	Tenant v. Elliott . . . . .	107,* 108
Syers v. Syers . . . . .	163	Tench v. Roberts . . . . .	100
Sykes v. Beadon . . . . .	244, 251, 252	Tennant, Ex parte . . . . .	13, 34, 38
	14, 22, 38, 555, 556,*	Terrell, Ex parte . . . . .	647, 728, 742
	557, 572	Terry v. Terry . . . . .	619
	102, 104, 105,*	Tew v. Earl of Winterton . . . . .	389
	106, 107, 108	Thacker v. Shepherd . . . . .	277
Symes v. Hughes . . . . .	107	Thicknesse v. Bromilow . . . . .	130, 169
Taitt, Ex parte . . . . .	692, 729, 730, 733	Thomas, Ex parte . . . . .	631
Tallis v. Tallis . . . . .	438*	— v. Atherton . . . . .	129, 367, 378,
Tamplin v. Diggins . . . . .	663		379, 387
Tanner's Case . . . . .	24	— v. Clarke . . . . .	147
Tanner v. Smart . . . . .	260	— v. Da Costa . . . . .	656
Tasker v. Shepherd . . . . .	113,* 114	— v. Edwards . . . . .	51
Tatam v. Williams . . . . .	363, 509*	— v. Frazer . . . . .	194, 596
Tate, Ex parte . . . . .	694	— v. Shillibeer . . . . .	242
Tatlock v. Harris . . . . .	239	— v. Thomas . . . . .	59, 567
Tattersall v. Groote . . . . .	66, 454	Thomason v. Frere . . . . .	289, 659, 667,*
Taunton v. Royal Insurance			668
Co. . . . .	128	Thompson, Ex parte (1 Rose) . . . . .	642
Taylor, Ex parte (5 De G. M.		— (3 Deac. & Ch.) . . . . .	726
& G.) . . . . .	631	— (2 M. D. & D.) . . . . .	723
— (12 Ch. D.) . . . . .	37	— v. Andrews . . . . .	609
— (18 Q. B. D.) . . . . .	629, 630	— v. Brown . . . . .	225, 228, 234,
— (8 De G. M. & G.) . . . . .	74, 75		236
— (Mon.) . . . . .	679, 687, 688, 689*	— v. Charnock . . . . .	514
— (2 M. D. & D.) . . . . .	685, 706, 707,	— v. Cohen . . . . .	752
	732	— v. Davenport . . . . .	177
— (2 Rose) . . . . .	737	— v. Dunn . . . . .	508
— v. Best . . . . .	72	— v. Hudson . . . . .	228
		— v. Lack . . . . .	237



Thompson v. National Bank of Toledo . . . . .	43	Tunley v. Evans . . . . .	128
— v. Percival . . . . .	242,* 243, 247,*	Tupper v. Foulkes . . . . .	137
— v. Ryan . . . . .	253	— v. Haythorne . . . . .	140, 673
— v. Speirs . . . . .	325	Turner, Ex parte . . . . .	734, 738
— v. Waithman . . . . .	263, 597	— v. Borlase . . . . .	475
— v. Williamson . . . . .	349, 380	— v. Burkinshaw . . . . .	391
Thomson v. Anderson . . . . .	548	— v. Corney . . . . .	537
— v. Thomson . . . . .	104, 109	— v. Dodwell . . . . .	261
Thornbury v. Beville . . . . .	93	— v. Hardcastle . . . . .	627
Thorne v. Smith . . . . .	224	— v. Major . . . . .	443, 448,* 478, 479, 527, 541, 550
Thornton, Ex parte . . . . .	716, 749	— v. Morgan . . . . .	59
— v. Dixon . . . . .	343,* 346, 347	— v. Reynall . . . . .	98
— v. Howe . . . . .	92	Turney, Ex parte . . . . .	717*
— v. McKewan . . . . .	228	— v. Bayley . . . . .	404, 493, 504
— v. Procter . . . . .	383,* 467	Turquand, Ex parte (2 M. D. & D.) . . . . .	21, 65, 727,* 738
Thorp v. Holdsworth . . . . .	491	— (14 Q. B. D.) . . . . .	677
Thorpe, Ex parte . . . . .	171, 703	— v. Vanderplank . . . . .	631, 665
— v. Jackson . . . . .	596, 597	— v. Wilson . . . . .	501
Thwaites v. Richardson . . . . .	128	Twiss v. Massey . . . . .	692
Tibaldi v. Ellerman . . . . .	565, 567	Twogood, Ex parte . . . . .	660
Till v. Wilson . . . . .	639	— v. Swanston . . . . .	513
Tinkler v. Walpole . . . . .	85	Twort v. Twort . . . . .	59
Titner, Ex parte . . . . .	698	Twycross v. Grant . . . . .	595
Tittenson v. Peat . . . . .	515	Twyford v. Trail . . . . .	161
Tobin, Ex parte . . . . .	642	Tyrrell v. Hope . . . . .	574
Todd, Ex parte (De Gex) . . . . .	738	Underwood v. Nicholls . . . . .	136
— (19 Q. B. D.) . . . . .	654	Union Bank of Manchester, Ex parte . . . . .	678
— v. Emly . . . . .	50	Unity Banking Association, Ex parte . . . . .	75, 702
— v. Studholme . . . . .	151	University of Cambridge v. Baldwin . . . . .	118
Tollemache, Re . . . . .	703	Upfil, Ex parte . . . . .	636
Tomkins v. Saffery . . . . .	629	Upton, Ex parte . . . . .	729
Tomlins v. Lawrence . . . . .	136	— v. Brown . . . . .	621
Toovey v. Milne . . . . .	653	Urquhart v. Macpherson . . . . .	260, 490
Topham, Ex parte (1 Madd.) . . . . .	715	Usborne, Ex parte . . . . .	680, 685
— (8 Ch.) . . . . .	629, 630	Usher v. Dauncey . . . . .	187, 211*
Topping, Ex parte . . . . .	599	Valpy v. Oakeley . . . . .	652
Torkington, Ex parte . . . . .	633	Van Sandau v. Moore . . . . .	462, 463, 571
Tosh v. North British Build. Soc. . . . .	12	Vardon, Ex parte . . . . .	687
Toulmin, Ex parte . . . . .	405	Varley v. Coppard . . . . .	336
— v. Copland . . . . .	230, 404, 405, 417,* 506, 518, 528, 537	Varney v. Hickman . . . . .	106
Townend v. Townend . . . . .	528,* 615, 616, 617	Vaughan, Ex parte . . . . .	745
Towns v. Mead . . . . .	258	— v. Halliday . . . . .	712
Townsend v. Ash . . . . .	492	— v. Vanderstegen . . . . .	120, 439
— v. Crowdy . . . . .	566, 567	Vaux, Ex parte . . . . .	677
— v. Neale . . . . .	276	Venables v. Wood . . . . .	14, 179
Townshend v. Devaynes . . . . .	344*	Venning v. Leckie . . . . .	563
Travis v. Milne . . . . .	488, 494, 517, 522, 531, 610, 613, 618	Vere v. Ashby . . . . .	89, 208, 285, 413
Tredwen v. Bourne . . . . .	87, 90, 133	Vernon v. Hallam . . . . .	440
Troughton v. Hunter . . . . .	215, 426, 446, 544, 588	— v. Hankey . . . . .	663, 668
Troup's Case . . . . .	390	— v. Jefferys . . . . .	273
Trueman, Ex parte . . . . .	588, 670	— v. Vawdry . . . . .	513
— v. Loder . . . . .	275	Vice v. Anson . . . . .	42, 87,* 348

Vice v. Fleming	170, 171, 174, 210	Waring, Ex parte	. 653, 712*
Vickers v. Vickers	. 432, 433	— v. Knight	. . 676
Villars, Ex parte	. . 358	Warner v. Barber	. . 639
Viney v. Chaplin	. . 151	— v. Cunningham	. . 575
Vining, Ex parte	. . 695	— v. Smith	. 351, 517
Vivers v. Tuck	. . 476	Warrant Finance Co.'s Case	. 228
Voguel, Ex parte	. . 694	Warwick v. Slade	. 370, 371
Vuilliamy v. Noble	47, 152, 199,	Waterer v. Waterer	. 331, 332,
211, 292, 294, 461, 590, 596, 605,	606, 661, 662		333,* 346*
Vyse v. Foster	162, 200, 461, 504,	Waterfall, Ex parte	. 255, 704*
521, 523, 524, 531, 534,* 615, 617,	718	Waterlow v. Sharp	. . 132
		Waters v. Paynter	. . 285
		— v. Taylor	357, 452, 466, 544, 546,
			558, 577, 580
Wade v. Jenkins	402, 421, 444, 448*	— v. Towers	. . 267
Wadeson v. Richardson	. 376*	Watkins, Ex parte (Mont. & McA.)	. . 734
Wadmore v. Dear	. . 348	— (2 M. & A.)	. . 680, 683
Wagner v. Imbrie	. . 753	— (4 D. & C.)	. . 683
Wagstaffe, Ex parte	. . 657	— (8 Ch.)	. . 677
Wainwright, Ex parte	. . 756	Watney v. Wells	. 390, 518, 521,
— v. Waterman	. 433		581
Wait. Re	340, 357, 359, 675, 695	Watson, Ex parte (Buck, and 4 Madd.)	. 728, 741, 742
Wakeham, Re	. . 737*	— (12 Ch. D.)	. . 639
Walburn v. Ingilby	. . 504	— (16 Ves.)	. . 40, 75
Walker, Ex parte (3 Deac.)	. 715	— (19 Ves.)	. . 31
— (4 D. G. F. & J.)	336, 338, 698	— (2 V. & B.)	. . 161
— v. Broadhurst	. . 418	— v. Black	. . 348
— v. Consett	. . 512	— v. Charlemont	. . 86, 482
— v. Harris	. . 64, 559	— v. Eales	. . 426
— v. Hirsch	10, 11, 14, 541, 544,	— v. Mid-Wales Railway Co.	. . 296
	555	— v. Spratley	. . 348
— v. Jeffreys	. . 468	— v. Woodman	. . 263
— v. Mottram	. . 440, 652	Watters v. Smith	. 224, 225
— v. Rooke	. . 267	Watts v. Brookes	. 97, 104, 388
Wallace v. Kelsall	136, 224, 269,	— v. Christie	. 293, 659, 660*
	294	— v. Rees	. . 290
Waller v. Barrett	. . 594	Waugh v. Carver	25, 27,* 31, 35,
— v. Lacy	. . 227		36, 40,* 42, 197
Wallis, Ex parte	. . 740	Way v. Bassett	. . 262,* 510
— v. Hirsch	. . 453	Weaver v. Prentice	. . 85
— v. Smith	. . 455	Webb, Re	. . 382, 387
Wallworth v. Holt	462, 463,* 498,*	— v. Ledsam	. . 218
	499, 500	Webber v. Tivill	. 259, 288, 509
Walmsley v. Cooper	145, 225, 237,	Webster, Ex parte	. . 703
	270	— v. Bray	84, 349, 350, 380, 391,
— v. Walmsley	. . 405, 538		477*
Walsham v. Stainton	. . 503	— v. Webster	47, 211, 217, 445,*
Walstab v. Spottiswoode	. 24		605
Walter v. Lavater	. . 62	Wedderburn v. Wedderburn	443,
Walton v. Butler	. . 325, 329		444, 489,* 512, 516, 517, 519, 533,*
Wanklyn v. Wilson	. . 505		614,* 617
Want v. Reece	. . 563	Weikersheim's Case	. 112, 141
Ward, Ex parte	. . 682	Weir v. Bell	. . 163
— v. Apprice	. . 404	Weldon v. Dicks	. . 113
— v. Ward	. . 612	Welford v. Liddel	. . 508
Warde's Case	. 152, 199, 596	Welcome's Trade-mark, Re	. 447
Warden v. Jones	. . 486		
Warder v. Stilwell	424, 466, 539,		
	543		

Wells v. Masterman . . .	171	Wieland, Ex parte . . .	634
— v. Wells . . .	564	Wier v. Tucker . . .	508
— v. Williams . . .	73	Wightman v. Townroe 28, 593,	604
Welsh, Ex parte . . .	639	Wilbeam, or Wilbran, Ex	
Wenlock (Baroness) v. River		parte . . .	636
Dee Co. 191, and see Addenda		Wild v. Milne 55, 555, 556, 557,	558
Werderman v. Société Gén-		Wilde v. Keep . . .	185
érale d'Electricité . . .	436	Wiles v. Woodward . . .	563
West v. Baker . . .	643	Wilkinson, Ex parte (13 Sim.)	680
— v. Skip . . . 340, 352, 353, 382,		— (22 Ch. D.) . . .	629
518, 647, 682, 688		— v. Frazier . . .	19, 29*
Western Bank of Scotland v.		— v. Haygarth . . .	59, 60
Needell . . .	213	— v. Henderson 460, 494, 596,	
West of England Bank, Re . .	162	597	
West of England, etc. Bank		— v. Page . . .	454
v. Murch . . .	341	— v. Torkington . . .	476
West Riding Union Banking		Wilks v. Back . . .	177
Co., Ex parte . . .	715, 717	Willesford v. Watson . . .	453
Westcott, Ex parte . . .	724, 738	Willett v. Chambers . . .	151,* 156
Weston v. Barton . . .	118	— v. Blandford . . .	521, 525, 617
Weymouth v. Boyer . . .	460	Williams, Re (36 Ch. D.) . .	709
Wharton v. May . . .	513	— Ex parte (Buck) . . .	208, 705
Whately v. Menheim . . .	90	— (3 M. D. & D.) . . .	721, 727,* 736
Wheatley, Ex parte . . .	190, 703	— (11 Ves.) . . .	217, 334, 337,* 352,
— v. Westminster, etc.		583, 587, 588, 687, 698, 700	
Coal Co. . . .	453	— v. Barton . . .	61, 562, 568
Wheeler, Ex parte 334, 337,* 699*		— v. Beaumont . . .	278
— v. Horne . . .	59, 61	— v. Bingley . . .	542
— v. Van Wart . . . 122,* 460, 461,		— v. Griffiths . . .	227, 509
571		— v. Jones 81, 100, 102,* 202,	
Whetham v. Davey 364, 461, 493,		412	
517		— v. Keats 89, 214, 216,* 217	
Whincup v. Hughes . . .	65, 66, 67	— v. Mudie . . .	85
Whinney v. Colonial Bank . .	678	— v. Page . . .	467
Whitcomb v. Whiting . . .	260, 261	— v. Powell . . .	531, 615
White, Ex parte . . .	160, 702	— v. Prince of Wales Life	
— v. Ansdell . . .	563	Co. . . .	504
— v. Barker . . .	502	— v. Rawlinson . . .	227, 230
— v. Barton . . .	505	— v. Rowlands 425, 552, 553,*	
— v. Williams . . .	136	555, 557, 558, 578*	
Whitehead v. Barron . . .	207	— v. Salmond . . .	463
— v. Hughes . . .	271, 289, 670	— v. Thomas . . .	186
Whitley v. Lowe . . .	508, 511, 554	— v. Williams (2 Swanst.)	437*
Whitmore, Ex parte 208,* 249, 254,		— (1 Wils. Ch.) . . .	478
704*		— (2 Ch.) . . .	81, 85, 331
— v. Empson . . .	678	Williamson v. Barbour 142, 143,	
— v. Gilmour . . .	652	267, 513	
— v. Mason . . .	433, 648*	— v. Johnson . . .	185*
Whittaker v. Howe 439, 478, 479,		Willis v. Bank of England . .	141
543		— v. De Castro . . .	237
Whittingstall v. Grover . . .	599	— v. Dyson . . .	170, 175, 210
Whittle v. McFarlane . . .	380	— v. Jernegan . . .	512
Whitwell v. Arthur . . .	578	Willison v. Patteson . . .	72, 73
— v. Perrin . . .	178, 254, 257	Willmott v. London Celluloid	
Whitworth, Ex parte . . .	230	Co. . . .	628
— v. Davis . . .	493	Willock, Ex parte . . .	733
Whyte v. Ahrens . . .	508, 514	Wilmer v. Currey . . .	197,* 595
Wickham v. Wickham 128, 146,		Wilsford v. Wood . . .	88, 235
227, 235*		Wilson, Ex parte (7 Ch.) . .	719, 748

Wilson, Ex parte (2 Deac. and 3 M. & A.) . . . . .	670	Wooldridge v. Norris . . . . .	375
— (4 Deac. & Ch.) . . . . .	678	Wooley v. Batte . . . . .	378, 566
— (2 Jur.) . . . . .	716	— v. Gordon . . . . .	601, 612
— (1 M. D. & D.) . . . . .	645	— v. Kelly . . . . .	200
— (3 id.) . . . . .	192, 702	Woolf v. City Steamboat Co. . . . .	265
— v. Bailey . . . . .	173	Worcester Corn Exchange Co., Re . . . . .	182, 141, 190, 369, 385
— v. Barthrop . . . . .	181	Worrall v. Grayson . . . . .	567
— v. Church . . . . .	576	Worthington, Ex parte . . . . .	638
— v. Cutting . . . . .	566	Worts v. Pern . . . . .	85, 89
— v. Greenwood . . . . .	218, 429, 433, 493, 517, 551, 553, 554, 555,* 556, 557, 559, 587, 647	Wragge's Case . . . . .	680
— v. Hurst . . . . .	234	Wray v. Hutchinson . . . . .	580
— v. Johnstone . . . . .	66, 68,* 69	— v. Milestone . . . . .	564
— v. Lewis . . . . .	22, 173	Wrexham v. Hudleston . . . . .	577
— v. Lloyd . . . . .	239, 248, 251, 254, 597	Wright, Ex parte . . . . .	645
— v. Moore . . . . .	162, 200, 617	— v. Court . . . . .	128
— v. Northampton, etc. . . . .		— v. Hunter . . . . .	385, 493, 495, 566, 752
Railway Co. . . . .	503	— v. Laing . . . . .	227
— v. Stanhope . . . . .	463, 499	— v. Pulham . . . . .	215
— v. Tuman . . . . .	148, 206	— v. Russell . . . . .	118
— v. Whitehead . . . . .	14, 144, 179, 203,* 328	— v. Snowe . . . . .	75
Winch v. Keeley . . . . .	289, 652	— v. Tuckett . . . . .	621
Windham v. Patterson . . . . .	635	— v. Warren . . . . .	620
Wingfield, Ex parte . . . . .	677, 683	Wrightson v. Pullan . . . . .	215, 222
Winter v. Innes . . . . .	250, 253, 262,* 510, 596, 597	Wych v. East India Co. . . . .	259
Winterbottom, Ex parte . . . . .	626	Wyld v. Hopkins . . . . .	24, 44
Wintle v. Crowther . . . . .	169, 181	Wylie, Ex parte . . . . .	732
Wish v. Small . . . . .	29	Wynget v. Heathcote . . . . .	55, 56
Withington v. Herring . . . . .	13, 28	Yallop, Ex parte . . . . .	324
Wolfe v. Horncastle . . . . .	372	Yates v. Finn . . . . .	411, 522, 527,* 528, 616
Wood, Re (7 Ch.) . . . . .	627, 628	Yeatman v. Yeatman . . . . .	613
— Ex parte (De Gex) . . . . .	691*	Yonge, Ex parte . . . . .	734
— (1 M. D. & D.) . . . . .	637	Yonge Klassina, The . . . . .	73
— (2 id.) . . . . .	730	York and North Midland Railway Co. v. Hudson . . . . .	384
— (4 De G. M. & G.) . . . . .	677	Yorkshire Banking Co. v. Beatson . . . . .	182*
— (10 Ch. D.) . . . . .	337, 629, 699	Young, Ex parte (2 V. & B.) . . . . .	54, 61
— v. Argyll . . . . .	24, 44,* 89, 90	— (19 Ch. D.) . . . . .	300, 624
— v. Braddick . . . . .	128, 240	— (2 Rose) . . . . .	741
— v. Dodgson . . . . .	741, 752*	— v. Axtell . . . . .	89
— v. Finch . . . . .	50	— v. Bank of Bengal . . . . .	656,* 661
— v. Scoles . . . . .	402, 403, 421	— v. English . . . . .	227, 228
— v. Wilson . . . . .	454	— v. Goodson . . . . .	272
— v. Woad . . . . .	408, 426, 487, 575	— v. Hunter . . . . .	205, 206,* 285
Woodbridge v. Swann . . . . .	672, 674	— v. Keighley . . . . .	359
Woodford, Ex parte . . . . .	720	— v. Waud . . . . .	627, 630
Woodgate, Ex parte . . . . .	680, 686	— v. White . . . . .	136
Woodhouse v. Murray . . . . .	628, 629	Zwilchenbart, Ex parte . . . . .	631
Woodin, Ex parte . . . . .	161	— v. Harrison (4 Madd.) . . . . .	508
Woodroffe, Ex parte . . . . .	740		
Woodward v. Gyles . . . . .	455		

# STATUTES REFERRED TO.

[THE REFERENCES ARE TO THE MARGINAL PAGES.]

13 Eliz. ch. 5 . . . . .	631	7 Geo. 4, ch. 46 .70, 96, 457, 586,	
21 Jac. 1, ch. 16			739
(Stat. Lim.) . . . . .	258	9 Geo. 4, ch. 14	
§ 3 . . . . .	258, 259, 262, 508	(Ld. Tenterden's Act) 509	
7 . . . . .	258	§ 1 . . . . .	261, 262
29 Car. 2, ch. 3		6 . . . . .	138, 165
(Stat. of Frauds)		8 . . . . .	262
§ 4 . . . . .	80, 81, 348	9 Geo. 4, ch. 23 . . . . .	96
17 . . . . .	348	9 Geo. 4, ch. 83 . . . . .	140
4 and 5 Ann. ch. 16		11 Geo. 4 and 1 Wm. 4, ch. 68	
(Stat. Lim.) . . . . .	258	§§ 5, 6 . . . . .	282
§ 17 . . . . .	258	3 and 4 Wm. 4, ch. 27	
19 . . . . .	258	(Stat. Lim.) . . . . .	258
27 . . . . .	53, 59	§ 16 . . . . .	258
6 Geo. 1, ch. 18 . . . . .	97	28 . . . . .	258
§ 18 . . . . .	101	40 . . . . .	258
2 Geo. 2, ch. 22 . . . . .	290	41 . . . . .	258
8 Geo. 2, ch. 13		42 . . . . .	258
§ 1 . . . . .	113	3 and 4 Wm. 4, ch. 42	
8 Geo. 2, ch. 24 . . . . .	290	(Stat. Lim.) . . . . .	258, 719
9 Geo. 2, ch. 36 . . . . .	348	§ 2 . . . . .	595
10 Geo. 2, ch. 28 . . . . .	101	3 . . . . .	258, 262
25 Geo. 2, ch. 33 . . . . .	101	4 . . . . .	258
28 Geo. 2, ch. 19 . . . . .	101	8 . . . . .	280
29 Geo. 2, ch. 16 (Irish) . . . . .	108	3 and 4 Wm. 4, ch. 83 . . . . .	96
23 Geo. 3, ch. 30 . . . . .	101	3 and 4 Wm. 4, ch. 98 . . . . .	96
39 and 40 Geo. 3, ch. 28		5 and 6 Wm. 4, ch. 76	
§ 15 . . . . .	96	§ 102 . . . . .	100
39 and 40 Geo. 3, ch. 98 . . . . .	99	1 and 2 Vict. ch. 106	
55 Geo. 3, ch. 194		§§ 29, 31 . . . . .	71, 74
(Medical Act)		4 Vict. ch. 14 . . . . .	71
§ 14 . . . . .	98, 99	5 and 6 Vict. ch. 39 . . . . .	140
4 Geo. 4, ch. 94		5 and 6 Vict. ch. 45 . . . . .	112
§§ 132, 133 . . . . .	95	6 and 7 Vict. ch. 46 . . . . .	101
5 Geo. 4, ch. 114		6 and 7 Vict. ch. 68 . . . . .	101
§ 1 . . . . .	97	6 and 7 Vict. ch. 73	
6 Geo. 4, ch. 16		§ 2 . . . . .	100
§ 62 . . . . .	731	26 . . . . .	100
6 Geo. 4, ch. 42		32 . . . . .	100
§ 10 . . . . .	96	7 and 8 Vict. ch. 32 . . . . .	96
6 Geo. 4, ch. 81		§ 8 . . . . .	95
§ 7 . . . . .	95	9 . . . . .	95
6 Geo. 4, ch. 94 . . . . .	140	21 . . . . .	95
6 Geo. 4, ch. 133 . . . . .	99	23 . . . . .	95

7 and 8 Vict. ch. 32		33 and 34 Vict. ch. 35	621
§ 29	95	35 and 36 Vict. ch. 93	
7 and 8 Vict. ch. 110	50, 93	§§ 13, 51	99
7 and 8 Vict. ch. 111	665	36 and 37 Vict. ch. 66	
15 and 16 Vict. ch. 86		(Jud. Act, 1873)	
§ 54	537	§ 24	259, 293, 375, 376
16 and 17 Vict. ch. 70		§ 25	275, 376
§ 123	579, 580	cl. 6	285, 293, 653
16 and 17 Vict. ch. 113		cl. 8	59, 62, 539, 546
§ 20	262	cl. 11	293
24	262	§ 34	491
27	262	§§ 56, 57	538
17 and 18 Vict. ch. 104		37 and 38 Vict. ch. 57	258
§ 18	325	§ 3	258
37	324	37 and 38 Vict. ch. 62	
43	324	§ 2	76
17 and 18 Vict. ch. 125		37 and 38 Vict. ch. 68	
§ 11	452, 515	§ 12	100
§ 61	299	37 and 38 Vict. ch. 96	95
19 and 20 Vict. ch. 47		38 and 39 Vict. ch. 77	
§ 90	740	(Jud. Act, 1875)	
19 and 20 Vict. ch. 97		§ 10	599, 662, 603, and
(Mercantile Law Amend.		Add. to p.	628
Act)	258	cl. 2	260
§ 4	117, 118, 119	cl. 11	259
9	258, 259, 509, 510	Rules of the Supreme Court, 1883	
10	255	Order VII.	
11	255	r. 2	265
12	255	Order IX.	
13	262	r. 6	266
14	262, 263, 597	Order XII.	
20 and 21 Vict. ch. 85		r. 15	266, 299
§§ 9, 21, 25, 26	77	Order XVI.	264, 274
21 and 22 Vict. ch. 90		r. 1	265, 274, 280,
§§ 32, 40	98		282, 288, 293,
21 and 22 Vict. ch. 108			647
§§ 6, 10	77	r. 4	265, 280, 282,
23 and 24 Vict. ch. 127			288, 293, 503,
§ 26	100		604, 647
25 and 26 Vict. ch. 63		r. 6	265, 280, 282,
§ 3	324		288, 293, 647
25 and 26 Vict. ch. 89		r. 7	501, 592
(The Companies Act, 1862)	50	r. 8	288
§ 2	70	r. 9	462
4	2, 70, 101	r. 11	265, 273, 274,
48	282		275, 278, 296
28 and 29 Vict. ch. 86		r. 14	265, 266
(Bovill's Act)	13, 19, 33, 34,	r. 15	265
35 <i>et seq.</i>	84, 100, 201	r. 16	604
30 Vict. ch. 23		rr. 48 <i>et seq.</i>	265,
§ 7	80, 97		285, 612
31 and 32 Vict. ch. 40	55, 56, 59	Order XVIII.	612
31 and 32 Vict. ch. 116	456	r. 1	501, 604, 647
31 and 32 Vict. ch. 121	98	r. 3	647
32 and 33 Vict. ch. 71		r. 6	265, 278, 604,
§ 39	657		647
§ 81	657	r. 7	265
33 Vict. ch. 14	72	Order XIX.	
33 and 34 Vict. ch. 23	71, 340	r. 3	290, 550

Rules of the Supreme Court, 1883.	46 and 47 Vict. ch. 52
Order XIX.	(Bank. Act 1883) 622 et seq.
r. 27 . . . 501	§ 5 . . . 625
Order XXI.	6
r. 20 . . . 264	cl. 1 (a) . . . 634
Order XXXI.	(c) . . . 631
r. 6 . . . 507	(d) . . . 624
r. 7 . . . 613	cl. 2 . . . 634
Order XXXIII.	9 . . . 650, 718
r. 2 . . . 538	10
r. 3 . . . 537	cl. 2 290, 709, 718,
r. 8 . . . 519	754
Order XXXVI.	18 . . . 754
r. 8 . . . 508	cl. 8 . . . 756
Order XL.	cl. 11 . . . 755
r. 10 . . . 538	cl. 12 . . . 755
Order XLII.	cl. 13 . . . 755
r. 10 266, 299, 300,	cl. 15 . . . 756
626	20
Order L.	cl. 1 . . . 646, 650
r. 6 . . . 550	23 . . . 754, 755, 756
Order LV.	cl. 3 . . . 755
rr. 3-9 . . . 462	27 . . . 670
r. 19 . . . 538	28 . . . 751
Supreme Court Funds Rules, 1886	cl. 2 . . . 751
r. 63 . . . 135, 272	cl. 5 . . . 752
39 Vict. ch. 6	29 . . . 654
§ 2 . . . 98	30 . . . 752
39 and 40 Vict. ch. 45 . . . 51	cl. 1 . . . 751
40 and 41 Vict. ch. 39 . . . 140	cl. 4 . . . 224, 752
42 and 43 Vict. ch. 11	31 . . . 751
(Bankers' Books Evi-	32 . . . 624
dence Act)	35 . . . 643
44 and 45 Vict. ch. 41	cl. 2 . . . 643
(Convey. Act, 1881)	37 . . . 707
§ 37 . . . 614, 618	38 . . . 654, 655
44 and 45 Vict. ch. 60	39 . . . 714
§ 8 . . . 99	40 . . . 709
45 and 46 Vict. ch. 61	cl. 3 693, 729, 730,
(Bills of Exchange	731
Act, 1882)	cl. 5 . . . 720, 730
§ 7, cl. 2 . . . 180	41 . . . 709
23 . . . 131	42 . . . 709
cl. 2 129, 180, 181	43 631, 650, 664, 681
45 and 46 Vict. ch. 75	44 646, 650, 651, 652
(Married Women's	cl. 1 . . . 683
Prop. Act, 1882)	44
§§ 1, 3, 12, 19 . . . 78, 624	cl. 3 625, 677, 678,
§ 3 . . . 730	681
46 and 47 Vict. ch. 49	45 . . . 654, 664, 674
§ 3 . . . 537	46 . . . 654, 675
46 and 47 Vict. ch. 52	cl. 3 . . . 626, 665
(Bank. Act, 1883) 622 et seq.	47 . . . 654, 664
§ 2 . . . 622	cl. 1 . . . 654
4 . . . 624, 625	cl. 2 . . . 654
cl. 1 (a) 630, 632	cl. 3 . . . 654
(b) 627	48 628, 653, 654, 664
(c) 628	49 630, 631, 654, 664,
(e) 665	668

46 and 47 Vict. ch. 52	Bankruptcy Rules, 1886
(Bank. Act 1883) 622 et seq.	r. 113 . . . 117
§ 50	r. 114 . . . 117
cl. 3 . . . 652	r. 127 . . . 694
cl. 4 . . . 651	r. 128 . . . 694
54 646, 650, 651, 652,	rr. 149-151 . . . 634
677	rr. 195-216 . . . 754
55 . . . 651, 652	r. 208 . . . 755
56	r. 211 . . . 755
cl. 1 . . . 652	rr. 211-213 . . . 755
cl. 5 . . . 651	r. 215 . . . 756
59 . . . 693, 729, 730	r. 216 . . . 755
cl. 1 . . . 731	rr. 235-238 . . . 751
64 . . . 753	r. 235 . . . 752
88 . . . 117, 624	r. 245 . . . 625
93 . . . 649, 669	r. 258 623, 633, 645
102 . . . 649, 669	r. 259 . . . 623, 624
cl. 2 . . . 754	r. 260 . . . 623
cl. 4 . . . 754	r. 261 . . . 623
106 . . . 643	r. 262 . . . 623
108 . . . 638	r. 263 . . . 623
109 . . . 643	r. 264 . . . 623
110 . . . 637	r. 265 . . . 637
112 . . . 644	r. 266 . . . 754, 755
113 . . . 289, 647, 670	r. 267 . . . 754, 755
114 289, 290, 670, 718	r. 268 637, 645, 646
115 . . . 623, 634	r. 269 637, 638, 639,
116	701, 729, 730
cl. 2 . . . 117, 624	r. 270 . . . 694
123 . . . 623	r. 271 . . . 624
148 . . . 624, 645, 707	r. 293 . . . 692, 693
152 . . . 624	r. 349 . . . 652
168 633, 650, 651, 652,	r. 353 . . . 622, 643
678	Appendix
169 . . . 622	Forms 6 . . . 626
Schedule I.	46 and 47 Vict. ch. 57
r. 13 . . . 645	(Trade Marks Act, 1883) 114
1. 26 . . . 117, 624	§ 64 . . . 114, 447
Schedule II.	65 . . . 114
r. 9-17 . . . 714	70 . . . 114, 447
rr. 13, 14 . . . 714	72 . . . 115
r. 15 . . . 714	75 . . . 114
r. 18 . . . 748	47 Vict. ch. 3 . . . 97
r. 20 . . . 719, 730	50 and 51 Vict. ch. 57 . . . 756
r. 21 . . . 708	§ 5 . . . 756
Bankruptcy Rules, 1886	50 and 51 Vict. ch. 58
r. 56 . . . 117, 624	§ 40 . . . 117
r. 69 . . . 670	50 and 51 Vict. ch. 66 . . . 754
r. 70 . . . 670	



# TABLE OF CASES CITED BY THE EDITOR.

[THE REFERENCES ARE TO THE BOTTOM PAGES.]

Abat v. Penny . . . . .	674	Aiken v. Thompson . . . . .	577
Abbot v. Jackson . . . . .	163	Ala. Fertilizer Co. v. Reynolds . . . . .	99, 258, 357, 358
— v. Johnson . . . . .	727, 957	Albe v. Wachter . . . . .	1172
— v. Pearson . . . . .	198	Albright v. Voorhies . . . . .	863
Abbot's Appeal . . . . .	757, 759	Alcott v. Strong . . . . .	182, 271
Abel v. Forgue . . . . .	573	Aldrich v. Lewis . . . . .	1229
Abernathy v. Latimore . . . . .	631	Alexander v. Alexander . . . . .	1230
— v. Moses . . . . .	754, 769	— v. Coulter . . . . .	1353
Abpt v. Miller . . . . .	291	— v. Gorman . . . . .	1326
Abraham v. Hall . . . . .	257	— v. Kimbro . . . . .	756
Abrahams v. Hunt . . . . .	1128	— v. Lewis . . . . .	964
— v. Myers . . . . .	1274	— v. State . . . . .	385
Ackles v. Stockle . . . . .	369	— v. Stern . . . . .	617
Ackroyd's Appeal . . . . .	189, 1328	Alfele v. Wright . . . . .	741
Adams v. Adams . . . . .	1009	Allen v. Anderson . . . . .	1148
— v. Beall . . . . .	156	— v. Blanchard . . . . .	880
— v. Carter . . . . .	76	— v. Butler . . . . .	664
— v. Funk . . . . .	32, 1234	— v. Cary . . . . .	259, 261, 296
— v. Gaubert . . . . .	1087	— v. Centre Valley Co. . . . .	780
— v. Gordon . . . . .	966	— v. Cheever . . . . .	334
— v. Hunter . . . . .	841, 858	— v. Clarke . . . . .	1550
— v. Kable . . . . .	1223	— v. Coit . . . . .	1172
— v. Marsteller . . . . .	812	— v. Davis . . . . .	14, 1245
— v. May . . . . .	629	— v. Dunn . . . . .	1339
— v. Paige . . . . .	1324, 1342	— v. Farrington . . . . .	319
— v. Ruggles . . . . .	294	— v. Grissom . . . . .	780
— v. Sturges . . . . .	1338	— v. Hawley . . . . .	824
— v. Thornton . . . . .	280	— v. Hill . . . . .	1296
— v. Ward . . . . .	808, 809	— v. Mining Co. . . . .	560
— v. Woods . . . . .	672	— v. Owens . . . . .	272
Adams' Bank v. Rice . . . . .	16, 63	— v. National Bank . . . . .	1300
Adams, In re . . . . .	1324	— v. Rostain . . . . .	202
Addams' Appeal . . . . .	952, 1537	— v. Wells . . . . .	1327
Addams v. Tutton . . . . .	1224	— v. Whetstone . . . . .	763
Addison v. Burckmyer . . . . .	831	— v. Withrow . . . . .	757
Adee v. Cornell . . . . .	23, 280	Allison v. Abendroth . . . . .	327, 483
— v. Demorest . . . . .	311	— v. Davidson . . . . .	794, 913
Adkins v. Arthur . . . . .	498	Almon v. Hamilton . . . . .	482
Adler v. Foster . . . . .	586	Alsop v. Mather . . . . .	1318
Ætna Ins. Co. v. Peck . . . . .	601, 603	Altman v. Altman . . . . .	1213
Ah Lep v. Gong Choy . . . . .	314	Alvord v. Smith . . . . .	870
Aigen v. Railroad Co. . . . .	23	Ambler v. Bradley . . . . .	14, 40
Aiken v. Jefferson . . . . .	1297	— v. Whipple . . . . .	1259, 1274
— v. Ogilvie . . . . .	915		

Ambs v. Caspari . . . . .	802	Arnold v. Green . . . . .	643
American Bank v. Doolittle . . . . .	569	— v. Hamer . . . . .	1324
American Bank Note Co. v. . . . .		— v. Morris . . . . .	56, 832
Edson . . . . .	707, 714	— v. Nichols . . . . .	496
American Cent. R. R. Co. v. . . . .		— v. Stevenson . . . . .	754, 768
Miles . . . . .	626	— v. Wainwright . . . . .	765
— v. Wortendyke . . . . .	548	Arnstædt v. Blumenfield . . . . .	208
American Ins. Co. v. Coster . . . . .	119	Artisans' Bank v. Treadwell . . . . .	487, 665
Ames v. Downing . . . . .	469, 486, 1293	Ash v. Guie . . . . .	120, 1535
Anidown v. Osgood . . . . .	509	Ashby v. Shaw . . . . .	12
Anderson v. Ackerman . . . . .	1297	Askew v. Odenheimer . . . . .	949
— v. Beebe . . . . .	1139, 1143	— v. Springer 895, 896, 897, 1118	
— v. Brown . . . . .	769	Aspinwall v. Williams . . . . .	65, 434
— v. Cheney . . . . .	845	Atchison v. Jones . . . . .	282
— v. Freeman . . . . .	498	Atchison, etc. R. R. Co. v. . . . .	
— v. Holmes . . . . .	673	Roach . . . . .	23
— v. Lemon . . . . .	713, 714	Atchison Sav. Bk. v. Temp- . . . .	
— v. Levan . . . . .	178, 606	lar . . . . .	280, 643
— v. Norton . . . . .	445, 782, 1300	Atherton v. Tilton . . . . .	40
— v. Pollard . . . . .	806	Atkin v. Berry . . . . .	267
— v. Powell . . . . .	227	Atkins v. Hunt . . . . .	16
— v. Robertson . . . . .	1236	— v. Saxton . . . . .	780, 789, 840, 849, 850, 851
— v. Snow . . . . .	193	Atkinson v. Rogers . . . . .	1093
— v. Tarpley . . . . .	528	Atlanta v. Dooly . . . . .	805
— v. Taylor . . . . .	894	Atlantic State Bank v. Sa- . . . .	
— v. Tompkins . . . . .	278, 279, 280, 754, 768	very . . . . .	296, 297
— v. Wanzer . . . . .	274	Atlas Nat'l Bank v. Savery . . . . .	295
— v. Whitlock . . . . .	705	Attaway v. National Bank . . . . .	205
Andrews, Succession of . . . . .	1207	Atwood v. Gillett . . . . .	1269
Andrews v. Brown . . . . .	765, 800, 808	— v. Lockhart . . . . .	498
— v. Ennis . . . . .	629	— v. Meredith . . . . .	163, 842
— v. Keith . . . . .	844, 848	— v. Smith . . . . .	1260
— v. Mann . . . . .	833	Auld v. Butcher . . . . .	1125
— v. Planters' Bank . . . . .	300, 341	Auley v. Osterman . . . . .	285
— v. Schott . . . . .	469, 473, 479	Aultinan v. Fuller . . . . .	22, 848
Angier v. Webber . . . . .	998	Aultman, etc. Co. v. Webber . . . . .	351
Angle v. Mississippi, etc. R. . . . .		Austin v. Cummings . . . . .	1024
R. Co. . . . .	1293	— v. Holland . . . . .	515, 541, 543
Anquila Wine Co. v. Weip- . . . .		— v. Seligman . . . . .	780
pert . . . . .	288	— v. Thompson . . . . .	12
Anslyn v. Franke . . . . .	271, 962	— v. Vandermark . . . . .	296
Anthony v. Wheatons . . . . .	698	— v. Vaughan . . . . .	1245
Appleton v. Smith . . . . .	73	— v. Walsh . . . . .	627
Argal v. Smith . . . . .	471	— v. Williams . . . . .	65
Arguinbo v. Hillier . . . . .	22	Auten v. Ellingwood . . . . .	128
Arick's Succession . . . . .	360	Autrey v. Frieze . . . . .	126, 132
Armand v. Burrum . . . . .	858	Averill v. Loucks . . . . .	765, 783, 848
Armistead v. Cocke . . . . .	841	— v. Lyman . . . . .	577
Armstrong, In re . . . . .	1310	Avery v. Fisher . . . . .	156, 367
Armstrong v. Crocker . . . . .	1114	— v. Lauve . . . . .	63
— v. Fahnestock . . . . .	1258	— v. Myers . . . . .	1351
— v. Robinson . . . . .	277	— v. Rowell . . . . .	341, 432
Arnett v. Finney . . . . .	1116	Ayer v. Ayer . . . . .	530
Arnold v. Angell . . . . .	1087	Ayrault v. Chamberlin . . . . .	502
— v. Arnold . . . . .	1304	Ayres v. Gallup . . . . .	496
— v. Brown . . . . .	366, 854, 1267, 1269, 1277	— v. Railroad Co. . . . .	1292
— v. Camp . . . . .	585	Azel v. Betz . . . . .	1223

Babb v. Mosby . . . . .	1311	Bank of Commerce v. Sel-	
— v. Reed . . . . .	1532	den . . . . .	413
Babcock v. Stewart . . . . .	498	Bank of Hamilton v. Blake-	
— v. Stone . . . . .	416	slee . . . . .	647
Bach v. State Ins. Co. . . . .	525	Bank of Kentucky v. Brook-	
Backus v. Fobes . . . . .	602	ing . . . . .	305
— v. Taylor . . . . .	541, 545	— v. Herndon . . . . .	782, 831
Bacon v. Cannon . . . . .	138	— v. Keizer . . . . .	1325
— v. Hutchings . . . . .	301, 518	Bank of Louisville v. Hall . . . . .	769, 848
— v. Kendall . . . . .	383	Bank of Mobile v. Andrews . . . . .	531,
— v. Lloyd . . . . .	739		1291
Badger v. Dænicke . . . . .	560, 652	Bank of Montreal v. Page, 240, 252,	
Bagley v. Smith . . . . .	1224	253, 255, 518, 521, 526, 531	
Bagwell v. Bagwell . . . . .	1324	Bank of New York v. Van-	
Bailey v. Bancker . . . . .	1552	derhorst . . . . .	240, 507
— v. Brownfield . . . . .	311	Bank of Port Gibson v.	
— v. Clark . . . . .	74	Baugh . . . . .	426, 1301
— v. Kennedy . . . . .	1332	Bank of Red Bank v. Farr . . . . .	781
— v. Moore . . . . .	1089	Bank of Rochester v. Bowen . . . . .	341
— v. Starke . . . . .	1225	— v. Monteath . . . . .	407, 434
Baird v. Baird . . . . .	715, 1215	Bank of St. Albans v. Gilli-	
— v. Cochran . . . . .	413	land . . . . .	296
Bake v. Smiley . . . . .	1324	Bank of South Carolina v.	
Baker v. Finney . . . . .	1325	Humphreys . . . . .	521, 531
— v. Mayo . . . . .	923, 925	Bank of Tennessee v. Saffo-	
— v. Nappier . . . . .	359	rans . . . . .	414
— v. Sheehan . . . . .	846	Bank of the Commonwealth	
— v. Stackpoole . . . . .	558	v. Mudgett . . . . .	541, 543
— v. Thompson . . . . .	763	Bank of Toronto v. Hall . . . . .	1327
— v. Wimpee . . . . .	1327	— v. Nixon . . . . .	519
Baker's Appeal . . . . .	785, 864	Bank of Vergennes v. Cam-	
Baldwin v. Burrows . . . . .	65	eron . . . . .	536
— v. Johnson . . . . .	534	Bank of Wilmington v. Al-	
— v. Richardson . . . . .	334, 337, 773	mond . . . . .	570
— v. Tynes . . . . .	280	Bankhead v. Alloway . . . . .	362, 1260
Baldy v. Brackenridge . . . . .	99	Banks v. Gibson . . . . .	1008
Ball v. Britton . . . . .	963	— v. Mitchell . . . . .	1252
— v. Farley . . . . .	734, 749	Bannerman v. Quackenbush . . . . .	629
Ballantine v. Frelinghuysen . . . . .	759,	Banner Tobacco Co. v. Jeni-	
	1353	son . . . . .	258, 325
Ballard v. Callison . . . . .	1201	Barber v. Gillson . . . . .	877
— v. McKenna . . . . .	161	— v. Mann . . . . .	421
Balliet v. Fink . . . . .	456	— v. Minturn . . . . .	290
Ballou v. Spencer . . . . .	119	— v. Smith . . . . .	629
Bancker v. Harrington . . . . .	501	Barbour v. Albany Lodge . . . . .	632
Bank v. Donaldson . . . . .	1174	Barclay's Appeal . . . . .	1145
— v. Fitch . . . . .	791	Barcroft v. Haworth . . . . .	198
— v. Fowle . . . . .	868	— v. Snodgrass . . . . .	353, 1300, 1332
— v. Gore . . . . .	318	Bardell v. Perry . . . . .	839
— v. Green . . . . .	586	Barhydt v. Perry . . . . .	788
— v. McDonald . . . . .	294	Baring v. Crafts . . . . .	430
— v. Sackett . . . . .	280	— v. Lyman . . . . .	301, 1239
— v. Thompson . . . . .	297	Barker v. Blake . . . . .	311
— v. Wilkins . . . . .	1342	— v. Watertown . . . . .	234
Bank of Alexandria v. Man-		— v. White . . . . .	1553
deville . . . . .	447	Barkley v. Tapp . . . . .	759, 788, 1280
Bank of America v. Shaw . . . . .	351	Barlow v. Coggan . . . . .	802, 807, 1297
Bank of Chenango v. Os-		— v. Reno . . . . .	644
good . . . . .	571	— v. Wiley . . . . .	664

Barnard v. Lapeer . . .	355	Beall v. Pool . . .	183
Barnes v. Jones . . .	1191, 1194	Beals v. Sea . . .	161
— v. Vetterlein . . .	780	Beaman v. Whitney . . .	362
Barnet v. Watson . . .	663	Bean v. Gregg . . .	1232
Barnett v. State . . .	380	Bearce v. Washburn . . .	50
Barnett Line of Steamers v. Blackmar . . .	98	Beardsley v. Tuttle . . .	349
Barney v. Currier . . .	350, 351	Beatson v. Harris . . .	363
Barrett v. McKenzie . . .	849	Beatty v. Amba . . .	456
— v. Railroad Co. . .	23	— v. Wray . . .	903
— v. Russell . . .	289	Beauregard v. Case . . .	25, 467, 682
— v. Swann . . .	102, 290	Beaver v. Lewis . . .	898
Barringer v. Sneed . . .	536	Beck v. Martin . . .	258
Barrows v. Downs . . .	480, 482	Becker v. Boon . . .	530
Barry v. Barry . . .	205, 1112, 1215	— v. Leonard . . .	285
— v. Briggs . . .	808, 1296, 1298	Beckam v. Peay . . .	537
Bartels v. Creditors . . .	457	Beckham v. Perry . . .	330
Bartholow v. Harvey . . .	327, 329	Beckley v. Munson . . .	866
— v. St. Joseph Lead Co. . .	312	Beckwith v. Manton . . .	778, 779, 780
Bartlett v. Jones . . .	74	— v. Talbot . . .	29
— v. M'Rae . . .	880	Beebe v. Rogers . . .	443
— v. Powell . . .	319, 372	Beecham v. Dodd . . .	174
Bartley v. Williams . . .	12 <sup>92</sup>	Beecher v. Bush 30, 41, 73, 99, 175, 258	
Bart's Appeal . . .	705	Beers v. Reynolds . . .	471, 473, 479
Bascom v. Young . . .	287	Beer's Succession . . .	1338
Bass v. Doering . . .	1323	Beeson's Appeal . . .	1145
— v. Emery . . .	1314	Behrens v. McKenzie . . .	160
— v. Estill . . .	1323	Beidler v. Shallenberger . . .	1241
— v. Messick . . .	367	Belcher v. Connor . . .	143
— v. Taylor . . .	536, 1087	— v. Whittemore . . .	973
Bassett v. Miller . . .	800, 808	Belknap v. Cram . . .	785
— v. Shepardson . . .	163, 1280	— v. Wendell . . .	21
Batchelder v. Altheimer . . .	485	Bell v. Donohoe . . .	1035
Bate v. McDowell . . .	498	— v. Faber . . .	260
Bates v. Bennett . . .	347	— v. Hall . . .	694
— v. Forch . . .	407	— v. Hare . . .	40
— v. Halliday . . .	332	— v. Hudson . . .	1116
Battaille v. Battaile . . .	1230	— v. Locke . . .	1010
Battle v. Street . . .	393	— v. Massey . . .	468
Batty v. Adams County . . .	1533	— v. Merrifield . . .	479
Bau v. Cole . . .	302	— v. Morrison . . .	526
Baum v. Fryrear . . .	584	— v. Newman . . .	1325
Baxter v. Bell . . .	338, 978	— v. Streeter . . .	1545
— v. Buchanan . . .	1203	Belt v. Mehen . . .	1131
— v. Clark . . .	411, 429	Belton v. Fisher . . .	802
— v. Plunkett . . .	489	Bement v. Brick Machine Co. . .	469
— v. Rodman . . .	44	Bement's Estate . . .	1329
Bayley v. Becnel . . .	925, 970	Bemis v. Becker . . .	366
Baylor Co. v. Craig . . .	99, 107	Bendel v. Hettrick . . .	79
Bays v. Conner . . .	289, 584	Benedict v. Davis . . .	98
Beacannon v. Liebe . . .	636	— v. Hettrick . . .	31
Beach v. Hayward . . .	803	— v. Hutchinson . . .	483
— v. Hotchkiss . . .	1234, 1244	— v. Thompson . . .	287, 304
— v. Ollendorf . . .	334	Benjamin v. Covert . . .	179, 510
— v. State Bank . . .	443	Benness v. Harrison . . .	76
— v. Vandewater . . .	183	Bennett v. Bennett . . .	759
Beacham v. Eckford . . .	927, 949, 952	— v. Buchan . . .	527, 535
Beal v. Snedcor . . .	647	— v. Cadwell . . .	1023
Beall v. Lowndes . . .	103	— v. Cram . . .	598

Bennett v. Marshall . . .	644	Bigelow v Reynolds . . .	622
— v. Russell . . .	894, 895	Biggs v. Hubert . . .	355
— v. Scott . . .	625	Billings v. Meigs . . .	317
— v. Snyder . . .	860	Billingslea v. Ware . . .	1130
— v. Stickney . . .	642	Billingsley v. Dawson . . .	240
— v. Woolfolk . . .	1088	Bininger v. Clark 998, 1007, 1010	
Bennett's Estate . . .	1324	Binney v. Legal . . .	645
Benninger v. Gall . . .	1088	— v. Young . . .	467
— v. Hess . . .	270, 307, 407	Binns v. Waddell . . .	327, 329
Benson, Re . . .	383	Birchett v. Bolling . . .	1059
Benson v. Ela . . .	1338	Bird v. Austin . . .	551
— v. Ketchum . . .	46	— v. Bird . . .	1304
— v. Kincaid . . .	569	— v. Hamilton . . .	951
— v. McBee . . .	102, 119	— v. Lanius . . .	359
— v. Morgan . . .	164	— v. McCoy . . .	625
Bentley v. Harris . . .	1094	— v. Morrison . . .	759, 764
— v. Smith . . .	628	Birddall v. Colie . . .	1200
— v. White . . .	119, 486	Birkett v. McGuire . . .	560, 584
Bentley's Estate . . .	1079	Birks v. French . . .	371
Benton v. Chamberlain . . .	511	Barnie v. Vandever . . .	1153
— v. Roberts . . .	172, 302	Bischoff v. Blease . . .	622, 629, 632
Bentrin v. Zierlin . . .	331	Bisel v. Hobbs . . .	192, 340, 429
Beny v. McLean . . .	1022	Bishop v. Austin . . .	100
Bergeron v. Richardott . . .	757	— v. Breckles . . .	1266
Berkshire Woolen Co. v. Juillard . . .	308, 426	— v. Georgeson . . .	199
Bernard v. Gaundry . . .	465	— v. Hall . . .	187
— v. Parvin . . .	631	— v. Hubbard . . .	845
— v. Torrance 180, 510, 585, 586		— v. Bishop . . .	1245
— v. Wilcox . . .	802	Bispham v. Patterson . . .	536
Berolzheimer v. Strauss . . .	700	Bissell v. Ames . . .	1088
Berry v. Brown . . .	882	— v. Carville . . .	646
— v. Cross . . .	1536	— v. Foss . . .	1538
— v. Folkes 266, 368, 754, 757, 923, 927, 1212, 1255, 1275, 1306, 1360		— v. Harrington 169, 170, 171	
— v. Jones . . .	902	Bitler v. Rathman . . .	163
— v. Kelly . . .	797	Bitzer v. Shunk . . .	644
— v. Powell . . .	631	Bivingsville Manuf'g Co. v. Bobo . . .	645
Berryhill v. McKee . . .	296, 536	Blachley v. Coles . . .	800
Berthold v. Goldsmith . . .	78	Black v. Black . . .	765, 766
Bertolet's Estate . . .	1326	— v. Bush . . .	782, 824, 1333
Bertwhistle v. Woodward . . .	858	— v. Merrill . . .	1128
Beste v. Burger . . .	283	— v. Seipt . . .	754, 759, 764
— v. Creditors . . .	373	— v. Struthers . . .	802
Bethel v. Chipman . . .	158	— v. Blackburn v. McCal-lister . . .	333
— v. Franklin . . .	1226	Blackiston's Appeal . . .	1086
Bethell v. Wilson . . .	1082	Black's Appeal . . .	764, 1323
Betts v. June . . .	1302	Blackwell v. Clayton . . .	1268
Bevan v. Allee . . .	1323	— v. Rankin . . .	1340
Bevans v. Sullivan 894, 948, 949		— v. Reid . . .	628
Beveridge v. Hewitt . . .	189	Blair v. Johnston . . .	915
Bewley v. Tams . . .	424	— v. Schaeffer . . .	17
Biddle v. Moore . . .	833	— v. Snover . . .	626
Bidwell v. Madison . . .	46	— v. Wood . . .	806
Biernan v. Biernan . . .	1229	Blaisdell v. Pray . . .	1252
— v. Braches . . .	1230	Blake v. Dorgan . . .	1275
Bigelow v. Elliott . . .	56, 72	— v. Nutler . . .	754
— v. Henniger . . .	351	— v. Sweeting . . .	1116, 1255
		— v. Wheaton . . .	306

Blakely v. Bennecke . . .	121	Bopp v. Fox . . .	767
Blaker v. Sands . . .	367, 808, 1255, 1280, 1297	Boro v. Harris . . .	841
Blakey v. Douglass . . .	691	Boston, etc. Co. v. Smith . . .	53, 54, 424
Blanchard v. Coolidge . . .	40	Boston, etc. R. R. Co. v. Pearson . . .	7, 1532, 1535
— v. Paschal . . .	123, 845	Bostwick v. Bissell . . .	76
Blankenship v. Wartelsky . . .	1323	Boswell v. Green . . .	278, 279
Blatchford v. Ross . . .	1553	Boswith v. West . . .	454
Bliffins v. Wilson . . .	1141	Bott v. Stoner . . .	189
Blin v. Pierce . . .	625, 665	Boughner v. Black . . .	917
Blinn v. Evans . . .	308	Bourne v. Woolbridge . . .	327
Bliss v. Swartz . . .	488	Bowas v. Pioneer Tow Line . . .	75
Bloch v. Price . . .	510, 516, 541	Bowen v. Argall . . .	469, 471
Blodgett v. Muskegon . . .	803	— v. Billings . . .	771, 774, 1324
— v. National Bank . . .	1361	— v. Crow . . .	659
— v. Weed . . .	289	— v. Mead . . .	298
Bloomfield v. Buchanan . . .	1139	— v. Richardson . . .	205
Bloss v. Chittenden . . .	1234	— v. Rutherford . . .	179
Blue v. Leathers . . .	35	— v. Sutherland . . .	649
Blumenthal, In re . . .	46	Bower v. Douglass . . .	532
Blumer, Re . . .	1325, 1331, 1379	Bowie v. Maddox . . .	98
Boardman v. Adams . . .	257	Bowker v. Bradford . . .	162
— v. Close . . .	894, 952	— v. Gleason . . .	952
— Gore . . .	296, 313, 318, 382, 411	Bowland v. Boozer . . .	1239
— v. Keeler . . .	45	Bowler v. Huston . . .	642, 647
Bodwell v. Eastman . . .	373	Bowling v. Dobyns . . .	926
Boehm v. Calisch . . .	625	Bowman v. Bailey . . .	14, 767
— v. United States . . .	681	— v. Cecil Bank . . .	292
Boeklin v. Hardenburgh . . .	126	— v. Floyd . . .	1011
Bofenschen, Succession of . . .	241	— v. O'Reilly . . .	1137
Boffandick v. Raleigh . . .	447	— v. Spalding . . .	585
Bogart v. Dart . . .	858	Bowyer v. Anderson . . .	81
Bogereau v. Gueringer . . .	468, 533	— v. Knapp . . .	584, 585, 586, 587
Boggs v. Johnson . . .	1118	Bowzer v. Stoughton . . .	1175, 1245
Bohler v. Tappan . . .	1300	Boyce v. Brady . . .	44
Bohrer v. Brady . . .	22, 917	— v. Burchard . . .	1200
Boire v. McGuin . . .	930, 1144, 1172, 1175	— v. Coster . . .	824, 830
Boisgerard v. Wall . . .	222, 636, 955	— v. Watson . . .	270, 642
Boling v. Anderson . . .	352	Boyd v. Brown . . .	1230
Bolton v. Dickens . . .	1116	— v. Clum . . .	341
Bond v. Aitkin . . .	337, 338	— v. Foot . . .	1112
— v. Hays . . .	1241	— v. McCann . . .	523, 547
— v. Nave . . .	192, 273, 1323	— v. Mynatt . . .	955, 1112
Bonis v. Louvrier . . .	914	— v. Ricketts . . .	179, 180, 190
Bonnafee v. Fenner . . .	179, 1236	Boyers v. Elliott . . .	733, 758
Bonne v. Kay . . .	808	Boynton v. Isaac . . .	358, 825
Bonnell v. Chamberlain . . .	180	Bracken v. Dillon . . .	496
Bonner v. Campbell . . .	184	— v. Kennedy . . .	1082, 1242, 1250
Bonney v. Stoughton . . .	1116	— v. March . . .	361
Bonsall v. Comly . . .	845	Bradbury v. Barnes . . .	862
Booe v. Caldwell . . .	197	— v. Smith . . .	478
Bookout v. Anderson . . .	1301	Bradford v. Kimberly . . .	894, 901
Boone v. Sirrine . . .	551	Bradley v. Brigham . . .	802, 925
Boor v. Lowrey . . .	270, 271	— v. Camp . . .	509
Boorum v. Ray . . .	858	— v. Chamberlin . . .	958
Booth v. Farmers' Bank . . .	321, 322	— v. Linn . . .	288
— v. National Bank . . .	319	— v. White . . .	40
Boozar v. Webb . . .	778	Bradner v. Strong . . .	382

Fradshaw v. Apperson . . . . .	56	Brooks v. McIntyre . . . . .	647
Brady v. Calhoun . . . . .	129, 169	— v. Sullivan . . . . .	280
— v. Hill . . . . .	537	— v. Washington . . . . .	757
Bragg v. Geddes . . . . .	253	Brower v. Creditors . . . . .	1353
Bragman v. McGuire . . . . .	98	Brown v. Agnew . . . . .	880
Braley v. Goddard . . . . .	38	— v. Atkinson . . . . .	271
Branch v. Adams . . . . .	859	— v. Beecher . . . . .	759
Brande v. Bond . . . . .	859	— v. Benner Co. . . . .	487
Brasfield v. French . . . . .	1360, 1361	— v. Birdsall . . . . .	665
Braun's Appeal . . . . .	734, 897	— v. Black . . . . .	319
Bray v. Farwell . . . . .	1551	— v. Broach . . . . .	518
— v. Seligman . . . . .	692	— v. Chancellor . . . . .	162, 163, 519, 1280
Brayley v. Goff . . . . .	363, 659	— v. Clark . . . . .	513
— v. Hedges . . . . .	303	— v. Crandall . . . . .	179
Brecher v. Fox . . . . .	781	— v. Davis . . . . .	589
Breckenridge v. Shrieve . . . . .	304	— v. Fitch . . . . .	432
Bredow v. Mutual Savings Institution . . . . .	526	— v. Hartford . . . . .	345
Breen v. Richardson . . . . .	766, 769, 1300	— v. Haven . . . . .	624
Brennan v. Pardridge . . . . .	236	— v. Haynes . . . . .	415, 471
Brent v. Davis . . . . .	380, 411	— v. Hicks . . . . .	40
Bressler v. McCune . . . . .	1178	— v. Higginbotham . . . . .	75, 1257
Brewer v. Browne . . . . .	766, 768, 798, 820, 1116	— v. Jacquette . . . . .	36
— v. Worthington . . . . .	1023	— v. Jaquette . . . . .	42
Brewster v. Hammett . . . . .	841, 853	— v. Jewett . . . . .	164
— v. Hardeman . . . . .	537	— v. Lang . . . . .	1320
— v. Mott . . . . .	330, 1127, 1130	— v. Lawrence . . . . .	331
Brick, In re . . . . .	1376	— v. Marsh . . . . .	569
Brickhouse v. Hunter . . . . .	1172	— v. McCune . . . . .	158
Bridge v. Gray . . . . .	276	— v. McFarland . . . . .	903
— v. McCullough . . . . .	1323	— v. O'Brien . . . . .	708
— v. Swain . . . . .	770, 804	— v. Pickard . . . . .	292
Brien v. Harriman . . . . .	1267	— v. Raine . . . . .	179, 189
Briggs v. Briggs . . . . .	535, 551	— v. Robbins . . . . .	21
— v. Hubert . . . . .	258	— v. Shackelford . . . . .	932
— v. Vanderbilt . . . . .	106	— v. Watson . . . . .	384, 1300
Brigham v. Clark . . . . .	79	— v. Young . . . . .	825, 840
— v. Dana . . . . .	24, 905	Browne v. Bedford . . . . .	1362
Bright v. Sampson . . . . .	649	Browning v. Cover . . . . .	740
Brinegar v. Griffin . . . . .	1084	— v. Marvin . . . . .	635
Brink v. New Amsterdam, etc. Ins. Co. . . . .	63, 277, 345	Brownlee v. Allen . . . . .	77
Brinley v. Kupfer . . . . .	1139	Brown's Appeal . . . . .	693, 895, 902, 920, 925, 1306
Brisban v. Boyd . . . . .	510	Brown's Estate . . . . .	925, 1313
Bristol v. Sprague . . . . .	298, 543	Brownson v. Metcalfe . . . . .	620
Broaddus v. Evans . . . . .	370, 1333	Brozee v. Poyntz . . . . .	339, 606
Broadnax v. Thomason . . . . .	851	Bruches v. Anderson . . . . .	361
Brock v. Bateman . . . . .	1326	Bruen v. Marquand . . . . .	334
— v. Brock . . . . .	164, 313	Brundred v. Muzzey . . . . .	12
Brockenbrough v. Hackley . . . . .	616	Brunson v. Morgan . . . . .	337, 763, 766
Brockway v. Burnap . . . . .	40	Brush v. Maudwell . . . . .	1221
Broda v. Greenwald . . . . .	1133, 1245	Bry v. Cook . . . . .	1176
Bromley v. Elliot . . . . .	73, 411	Bryan v. Tooke . . . . .	301
Brooke v. Evans . . . . .	489	Bryant v. Hawkins . . . . .	550
— v. Washington . . . . .	430	— v. Hunter . . . . .	771
Brooks v. Allen . . . . .	318	Bryce v. Joynt . . . . .	198, 199
— v. Brooks . . . . .	1341	Bryden v. Taylor . . . . .	180
— v. Martin . . . . .	227, 701	Bryer v. Weston . . . . .	178

Buchan v. Sumner	754, 759, 1323, 1336	Burley v. Russell.	158
Buchanan v. Cheseborough	1260	Burlington, etc. R. R. Co. v. Dick	631
— v. Comstock	1210	Burn v. Burn	1036
— v. Curry	277	Burnell v. Weld	694
— v. Meisser	327, 1246, 1535	Burnett v. Hope	1292
Buchoz v. Grandjean	277	— v. Snyder	73, 116, 177, 618
Buck v. Dowley	20	— v. Sullivan	455
— v. Mosley	327	Burney v. Boone	1238
— v. Smith	1058	Burnham v. Hopkinson	1247
— v. Winn	1339	— v. Whittier	306
Buckell v. McGuire	560, 877	Burnley v. Rice	303, 427
Buckingham v. Burgess	98, 682	Burns v. Hall	628
— v. Hanna	268	— v. McKenzie	536
— v. Ludlum	598, 611, 925, 1328	— v. Nottingham	1233, 1245
Buckley v. Buckley	768	— v. Rowland	102
— v. Carlisle	1223	— v. Scott	1223
— v. Dingman	483	Burnside v. Savier	801
— v. Lord	486	Burpee v. Bunn	1323
Bucklin v. Bucklin	578	— v. Smith	189
Buckmaster v. Gowen	1228	Burr v. De La Vergne	973
Bucknam v. Barnum	77	— v. Williams	531
Buckner v. Lee	75, 445	Burrall v. Acker	849
— v. Rees	178, 1235	Burress v. Blair	865
Buck Stove Co. v. Johnson	782	Burroughs v. Knutton	846
Buell v. Cole	1236, 1245	Burt v. Lathrop	120
Buffalo City Bank v. Howard	510	Burton v. Baum	846
Buffum v. Buffum	178, 759	— v. Ferris	340
— v. Seaver	1344	— v. Goodspeed	40
Buflin v. Boyce	1194	Burtus v. Tisdall	786
Buford v. Neely	894, 1095	Burwell v. Mandeville	1291, 1293
Bulkley v. Marks	477, 479, 486	— v. Springfield	327
Bull v. Harris	283	Busby v. Chenault	1337
— v. Schubert	40	Busfield v. Wheeler	779
Bullard v. Kinney	1536	Bush v. Bush	175, 399, 1255
Bullfinch v. Winchenbach	21, 843, 859	— v. Clark	811, 1300
Bullitt v. M. E. Church	778	— v. Guion	950
Bullock v. Ashley	1144, 1147	— v. Linthicum	156, 1114
— v. Hubbard	1344	Butler v. American Toy Co.	166, 167, 1292
Bumpuss v. Webb	1242	— v. Barleson	999
Bundy v. Youmans	1140	— v. Finck	40, 174, 260
Burbank v. Haas	101	— v. Henry	181, 182, 496, 1255
Burchard v. Boyce	1037, 1104	— v. Kirby	803
Burckhardt v. Burckhardt	1008, 1009	— v. Lemley	894
Burckle v. Eckhart	40	— v. Stocking	343
Burdick v. Washburn	35	Butterfield v. Beardsley	1532, 1553
Burditt v. Grew	1238	— v. Hemsley	336
Burgan v. Cahoon	99	Button v. Hampson	334
Burgen v. Dwinal	659	Buxton v. Edwards	516, 519, 520, 526, 618
Burgess v. Badger	895, 918	Buzard v. Greenville Bank	40
— v. Lane	202	— v. Jolley	179, 190
Burgwin v. Hastler	802	Byam v. Bickford	1535
Burk v. Platt	163	Bybee v. Hackett	1538
Burleigh v. Parton	356, 413	Byers v. Bourret	210
— v. White	897	Byington v. Gaff	340
Burley v. Harris	636, 1245	Byrd v. Fox	1218, 1226, 1232
		Byrne v. Schwing	625



Cabaniss v. Clark . . .	829	Carithers v. Jarrell . . .	828
Cadwallader v. Kroesen . . .	328	Carlin v. Donegan 917, 1088,	1139
Cady v. Shepherd . . .	337, 537	Carlisle v. Mulhern . . .	758
Cahoon v. Hobart . . .	514	— v. Tenbrook . . .	912
Caldwell v. Bloomington		Carlton v. Cummings 1255,	1257
Mfg. Co. . . .	1324	— v. Jenness . . .	521, 531
— v. Davis . . .	707, 1273	— v. Ludlow . . .	185
— v. Leiber . . .	753, 894	— v. Ludlow, etc. Mills . . .	179
— v. Palmer . . .	754, 848	Carmichael v. Greer . . .	541
— v. Scott . . .	368, 1338	— v. Grier . . .	111
— v. Sithens . . .	446	— v. Sharp . . .	1142
— v. Stileman . . .	1319	Carney v. Hotchkiss . . .	432
California Furniture Co. v.		Carpenter v. Camp . . .	1172, 1174
Halsey . . .	1376	— v. Carpenter . . .	158
Calk v. Orear . . .	606	Carper v. Hawkins . . .	534, 1140
Calkins v. Smith . . .	415	Carrier v. Cameron . . .	290
Callender v. Robinson . . .	692	Carroll v. Alston . . .	1292
— v. Sweat . . .	186	— v. Evans . . .	1280
Calloway v. Tate . . .	1108	— v. Gavarré . . .	616
Calvert v. Miller . . .	1297, 1308	Carson v. Byers . . .	284, 308, 426
Calvin v. Markham . . .	636	Carter v. Adamson . . .	1021
Calvit v. Markham . . .	1252	— v. Beaman . . .	329
Camblat v. Tupery . . .	1176	— v. Bradley . . .	797
Cameron v. Bickford . . .	1172	— v. Christie . . .	1239
— v. Blackman . . .	360	— v. Currie . . .	669
— v. Francisco . . .	895, 902, 903	— v. Douglass . . .	179
— v. Watson . . .	945, 1173	— v. Galloway 327, 1324,	1330
Cammack v. Johnson . . .	1340	— v. Lipsey . . .	1154, 1301
Camp v. Fraser . . .	1311	— v. Pomeroy . . .	356
— v. Montgomery . . .	31	— v. Roland . . .	849, 854
Campbell v. Bowen . . .	360, 725	Carthaus v. Ferrers . . .	277
— v. Campbell . . .	767	Carver Gin, etc. Co. v. Ban-	
— v. Colorado C. & I. Co. . .	2	non . . .	782
— v. Coquard . . .	923, 925, 1142	Cary v. Williams . . .	1223
— v. Dent . . .	31	Cisco Bank v. Hills . . .	523
— v. District of Columbia . . .	354, 681	Case v. Beauregard 400, 780,	784, 827
— v. Hastings 111, 179, 180,	185	— v. Cushman . . .	1020
— v. Hooper . . .	160	— v. Maxey . . .	1238
— v. Lalock . . .	1020	Casey v. Carver . . .	332
— v. Matheus . . .	557	Cash v. Farnshaw . . .	1275
— v. Page . . .	330	— v. Tozer . . .	645
— v. Stewart . . .	914	Cassidy v. Hall . . .	53, 197
— v. Whitley . . .	183	— v. Metcalf . . .	1005
Campston v. McNair . . .	119	Castle v. Bullard . . .	379
Canada v. Barksdale . . .	170, 1275	— v. Reynolds . . .	1301
Candler v. Stange . . .	1080, 1150	Castly v. Towles . . .	1092
Canfield v. Hard . . .	1108	Caswell v. Cooper . . .	1226
Cannon v. Copeland . . .	1039	— v. Howard . . .	864
— v. Lindsey . . .	327	Catlin v. Gilders . . .	259
— v. Wildman . . .	326	Catron v. Shepherd . . .	715
Capelle v. Hall . . .	257, 263	Catskill Bank v. Gray . . .	73
Capen v. Barrows . . .	1227	— v. Messenger . . .	570
Cape Sable Co.'s Case . . .	1269	— v. State . . .	296
Capp v. Lacey . . .	478	Causler v. Wharton 169, 757,	765, 1123
Carey v. Burruss . . .	162	Causter v. Burke . . .	1249
Cargill v. Corby . . .	411, 421	Cavitt v. James . . .	1298, 1299
Carhart v. Killough . . .	469	Cayton v. Hardy . . .	260
Carillon v. Thomas . . .	842, 844, 849		

Cayton v. Walker . . . . .	1124	Chase v. Scott . . . . .	797
Central, etc. Bank v. Walker . . . . .	98	— v. Steel . . . . .	1823
Central, etc. Institution v. Walker . . . . .	8	— v. Stevens . . . . .	132
Central R. R. v. Smith . . . . .	174, 179 189, 202	— v. Vaughan . . . . .	577
Chadsey v. Harrison . . . . .	1245	Chazournes v. Edwards . . . . .	293, 297, 298
Chadwick v. Burrows . . . . .	367	Cheeseman v. Sturges . . . . .	762
Chaffee v. Rentfroe . . . . .	189	— v. Wiggins . . . . .	1091
Chaffin v. Chaffin . . . . .	593	Cheever v. Lamar . . . . .	923, 1172
Chaffraix v. Lafitte . . . . .	77	Chemung, etc. Bank v. Bradner . . . . .	512
— v. Price . . . . .	40	— v. Ingraham . . . . .	437
Chalfant v. Grant . . . . .	845, 846	Cheney v. Newberry . . . . .	210, 211
Chalk v. Bank . . . . .	1084	Chenowith v. Chamberlin . . . . .	299
Chalmers v. Turnipseed . . . . .	1327	Chester v. Dickenson . . . . .	169, 215, 382, 401
Chamberlain v. Bancroft . . . . .	531	Chicago Lumber Co. v. Ashworth . . . . .	763
— v. Chamberlain . . . . .	606, 714, 759, 762	Chidsey v. Porter . . . . .	198
— v. Dow . . . . .	516, 776, 798	Child v. Wofford . . . . .	428
— v. Jackson . . . . .	174	Childs v. Hyde . . . . .	802
— v. Walker . . . . .	1229, 1230	— v. Seabury . . . . .	1246
Chamberlin v. Prior . . . . .	401	Chiple v. Keaton . . . . .	369
Chambers v. Clearwater . . . . .	378	Chipman v. Kellogg . . . . .	845
— v. Crook . . . . .	1143	Chipman, Re . . . . .	848
— v. Groat . . . . .	189	Chisholm v. Cowles . . . . .	125
Chambersburg, etc. Co. v. Hazelet . . . . .	428	Chittenden v. German American Bank . . . . .	335
Chambovet v. Cagney . . . . .	162	— v. Witbeck . . . . .	258, 714, 860, 1001, 1117, 1299, 1307
Champion v. Bostwick . . . . .	105	Choppin v. Wilson . . . . .	840, 854
— v. Wilson . . . . .	585	Christ v. Firestone . . . . .	367
Champlin v. Tilley . . . . .	181, 192	Christian v. Crocker . . . . .	42
Chance v. Chambers . . . . .	633	— v. Ellis . . . . .	339, 1323, 1337
Chandler v. Allen . . . . .	907, 1171	Christy v. Sherman . . . . .	644
— v. Brainard . . . . .	15	Christy's Appeal . . . . .	1079, 1083, 1138
— v. Herrick . . . . .	571	Church v. First Nat'l Bank . . . . .	317
— v. Higgins . . . . .	877	— v. Sparrow . . . . .	312
— v. Sherman . . . . .	261, 1146	— v. Spiegelburg . . . . .	1246
Channel v. Fassitt . . . . .	860	Churchill v. Proctor . . . . .	863
Chapin v. Clemitson . . . . .	742	Cilley v. Huse . . . . .	759, 771
— v. Streeter . . . . .	709	— v. Van Patten . . . . .	1248
Chapline v. Conant . . . . .	79	Cirkel v. Crosswell . . . . .	98
Chapman v. Chapman . . . . .	1093	Citizens' Bank v. Hine . . . . .	177, 497
— v. Devereaux . . . . .	411	Citizens' Mutual Insurance Co. v. Lignon . . . . .	1292, 1307, 1351, 1359
— v. Devereux . . . . .	2, 430	City Bank of Brooklyn v. Dearborn . . . . .	543
— v. Lipscomb . . . . .	22, 42	— v. McChesney . . . . .	543
— v. Watson . . . . .	63	City Bank's Appeal . . . . .	444
— v. Wilson . . . . .	198	City Nat'l Bank v. Phelps . . . . .	511
Chappell v. Griffith . . . . .	1008	City of Maquoketa v. Willey . . . . .	778, 785
Chardon v. Oliphant . . . . .	537	Clagett v. Kilbourne, . . . . .	477, 1532
Charles v. Eshleman . . . . .	642, 1324, 1539	— v. Salmon . . . . .	571
Charman v. Henshaw . . . . .	197	Clair v. Smith . . . . .	1140
— v. McLane . . . . .	335	Clancy v. Craine . . . . .	171
Chase v. Barrett . . . . .	26, 48, 49	Clanton v. Price . . . . .	277
— v. Bean . . . . .	864		
— v. Buhl Iron Works . . . . .	327		
— v. Deming . . . . .	662		
— v. Garvin . . . . .	1236, 1245		
— v. Kendall . . . . .	526		

Clap, Re . . . . .	810, 1363	Cleveland v. Harding . . . . .	1362
Clapham v. Crabtree . . . . .	820, 1246	— v. Woodward . . . . .	625, 665
Clapp v. Brown . . . . .	299	Cleveland Paper Co. v. Courier Co. . . . .	166
— v. Pawtucket Institution . . . . .	622	Cleverdon, Re . . . . .	1329, 1330
— v. Rogers . . . . .	543	Clift v. Barrow . . . . .	51
— v. Upson . . . . .	513	Clifton v. Howard . . . . .	22, 176
Clark v. Barnes . . . . .	16	Cline v. Wilson . . . . .	809, 811
— v. Billings . . . . .	576	Clouch v. Moyer . . . . .	1128
— v. Clark . . . . .	12, 3	Clough v. Hoffman . . . . .	1024
— v. Dearborn . . . . .	298	Coates v. Preston . . . . .	660, 681
— v. Dibble . . . . .	1232	Cobb v. Abbott . . . . .	105
— v. Fletcher . . . . .	546	— v. Illinois Central R. R. Co. . . . .	435
— v. Fowler . . . . .	1223	Cobble v. Tomlinson . . . . .	801
— v. Gilbert . . . . .	40	Cochran v. Albert . . . . .	1281
— v. Gridley . . . . .	1146	— v. Anderson County National Bank . . . . .	55
— v. Hogeman . . . . .	278	— v. Bartle . . . . .	1134
— v. Holmes . . . . .	431, 662	— v. Cunningham . . . . .	277, 622
— v. Houghton . . . . .	347	— v. National Bank . . . . .	369
— v. Howe . . . . .	804	— v. Perry . . . . .	178, 1281
— v. Hymen . . . . .	354	Cochrane v. Allen . . . . .	1232
— v. Johnson . . . . .	357, 360	Cocke v. Branch Bank . . . . .	299
— v. Jones . . . . .	1155	Cockrell v. Thompson . . . . .	683, 1245
— v. Lyman . . . . .	847	Cockroft v. Clafin . . . . .	343
— v. McClelland . . . . .	280	Codding, Re . . . . .	766, 768
— v. Miller . . . . .	625	Coddington v. Hunt . . . . .	514
— v. Mills . . . . .	879	— v. Idell . . . . .	709, 894
— v. Reed . . . . .	15	— v. Tappan . . . . .	1201
— v. Ritter . . . . .	1036	Coder v. Huling . . . . .	715
— v. Rives . . . . .	278	Cody v. Cody . . . . .	1281
— v. Smith . . . . .	40	Coffee v. Eastland . . . . .	622, 629
— v. Stoddard . . . . .	649, 661	Coffin v. Douglass . . . . .	285
— v. Taylor . . . . .	189, 258, 270, 313, 407, 590, 681	— v. Jenkins . . . . .	44
— v. Warden . . . . .	922	— v. McCullough . . . . .	835
— v. Wilson . . . . .	280	Coffing v. Taylor . . . . .	865
Clarke v. Mills . . . . .	1244	Coffin's Appeal . . . . .	313, 478, 481, 488
Clarke's Appeal . . . . .	1084	Coggsell v. Davis, . . . . .	510, 514
Clark's Appeal . . . . .	762	Cogswell v. Wilson . . . . .	3, 22, 40, 182
Clarkson v. Carter . . . . .	625	Cohen v. N. Y. Life Ins. Co. . . . .	154
— v. E. & N. S. Dispatch . . . . .	1545	Cole v. Butler . . . . .	197
Clay v. Carter . . . . .	358	— v. Moxley . . . . .	1266
— v. Cottrell . . . . .	413	— v. Pennell . . . . .	664
— v. Freeman . . . . .	1298	— v. Reynolds . . . . .	1127
— v. Vanwinkle . . . . .	691	Colegrove v. Tallman . . . . .	553
Clayton v. May . . . . .	455, 691, 862	Colehour v. Coolbaugh . . . . .	1150
Cleghorn v. Ins. Bank . . . . .	1327	Coleman v. Bellhouse . . . . .	411
— v. Johnson . . . . .	191	— v. Coleman . . . . .	6, 706, 1244, 1535
Clement v. British-Am. Ass. Co. . . . .	345	— v. Darling . . . . .	281
— v. Brush . . . . .	337, 338	— v. Elmore . . . . .	453, 681
— v. Clement . . . . .	510, 531, 616	— v. Lansing . . . . .	1021
— v. Foster . . . . .	785	— v. Marble . . . . .	1048
— v. Hadlock . . . . .	39	— v. O'Neil . . . . .	401, 576
Clements v. Jessup . . . . .	841, 1325	— v. Pearce . . . . .	382
— v. Mitchell . . . . .	181, 906, 1173	— v. Rosenfeld . . . . .	281
Cleveland v. Anderson . . . . .	176, 951	Coles v. Coles . . . . .	754, 765
— v. Battle . . . . .	285, 781	Colgin v. Cummins . . . . .	925
— v. Duggan . . . . .	179, 189	Collamer v. Foster . . . . .	1245

Collender v. Phelan . . . . .	1309, 1312	Cook, In re . . . . .	788
Collett v. Smith . . . . .	271	Cook v. Arthur . . . . .	843
Collier v. Cross . . . . .	203, 296	— v. Beach . . . . .	633
— v. Leach . . . . .	585	— v. Bloodgood . . . . .	332
Collins' Appeal . . . . .	347	— v. Carpenter . . . . .	63, 104
Collins v. Butler . . . . .	740, 1323	— v. Carson . . . . .	1302
— v. Charlestown M. F.		— v. Castner . . . . .	365
Ins. Co. . . . .	467	— v. Frederick . . . . .	199, 202
— v. Decker 762, 764, 769, 771		— v. Jenkins . . . . .	881
— v. Hood . . . . .	1333	— v. Lewis . . . . .	1298
— v. Owens . . . . .	1143	— v. Phillips . . . . .	895, 896, 898
Collomb v. Caldwell . . . . .	1332	— v. Rogers . . . . .	1294, 1359, 1362
Collumb v. Read . . . . .	756	— v. Slate Co. . . . .	100, 179, 180
Collyer v. Collyer . . . . .	1083	— v. Watson . . . . .	767
— v. Moulton . . . . .	602	Cooke v. Allison . . . . .	308
Colt v. Wilder . . . . .	489, 496	Cookingham v. Lasher 431, 625, 662	
Colville v. Gilman . . . . .	1245	Cooley v. Broad . . . . .	75
Colwell v. Britton . . . . .	73, 177	— v. Sears . . . . .	659
Combs v. Boswell . . . . .	331, 411	Coons v. Remick . . . . .	263
— v. Mutual Fire Ins. Co. . . . .	346	Coope v. Bowles . . . . .	280, 281
Commercial & S. Bank v.		Cooper v. Burns . . . . .	115
Corbett . . . . .	767, 846	— v. Frederick . . . . .	1128, 1147
— v. Mitchell . . . . .	692	— v. Frierson . . . . .	362
— v. Warren . . . . .	356	— v. McClurkan . . . . .	413
Commercial Bank of Man-		— v. McNeill . . . . .	925
chester v. Lewis . . . . .	306, 834	— v. Merrihew . . . . .	903
Commercial National Bank		— v. Reid . . . . .	903
v. Proctor . . . . .	259, 809, 1301	Cooper's Appeal . . . . .	842, 1343
Commonwealth v. Bennett 40		Coover's Appeal . . . . .	1343
Como v. Port Henry Iron		Copcutt v. Merchant . . . . .	1320
Co. . . . .	541	Copes v. Fultz . . . . .	803
Comstock v. Buchanan . . . . .	709, 710	Copes' Appeal . . . . .	1344
— v. White . . . . .	979	Copley v. Lawhead . . . . .	102
Conant v. Frary . . . . .	864, 1323	Corbett, In re . . . . .	797
Conery v. Hayes . . . . .	537	Corbin v. Graves . . . . .	487
— v. Rotchford . . . . .	644	— v. McChesney . . . . .	333
Congdon v. Monroe . . . . .	454	Corcoran v. Trich . . . . .	647
— v. Morgan . . . . .	1008	Cornell v. Stanhope . . . . .	560
Conklin v. Barton . . . . .	79, 186	Corner v. Gilman . . . . .	626, 1036
— v. Ogborn . . . . .	531	Corning v. Greene . . . . .	1549
Conkling v. Washington Uni-		— v. Grohe . . . . .	253
versity . . . . .	21, 797, 1323, 1336	Cornwall v. Cornwall . . . . .	769, 771
Conley v. Chapman . . . . .	455	Corwin v. Suydam . . . . .	280, 369
— v. Good . . . . .	662	Cory v. Long . . . . .	834
Connon v. Dunlap . . . . .	858	Cosgrave Brewing Co. v.	
Connor v. Abbott . . . . .	6	Starrs . . . . .	1292
— v. Allen . . . . .	1298	Costello v. Nixdorff . . . . .	543
Conrad v. Buck 257, 518, 526, 529,		Coster v. Bank of Georgia . . . . .	774
1118, 1269, 1280		— v. Clarke . . . . .	1336
Conroe v. Birdsall . . . . .	158	Costley v. Wilkerson . . . . .	811
Conrow v. Gravenstine 469, 470		Cothran v. Knox . . . . .	903
Couroy v. Campbell . . . . .	736	— v. Marmaduke . . . . .	31, 40
— v. Woods . . . . .	783	Cottle v. Harrold . . . . .	754, 759, 788
Consolidated Bank v. State 51		— v. Leitch . . . . .	1277
Converse v. Hobbs . . . . .	1177	Cotton v. Evans . . . . .	413
— v. McKee . . . . .	1324	— v. Mitchell . . . . .	1116, 1121
— v. Shambaugh . . . . .	189, 191	Cottrell v. Babcock Printing	
Conwell v. Sandidge 500, 824, 831		Press Mfg. Co. . . . .	1002
Cony v. Wheelock . . . . .	533	Cottrill v. Vanduzen . . . . .	98

Couch v. Mitts . . . . .	571	Crites v. Wilkinson . . . . .	367
— v. Woodruff . . . . .	175, 176, 973	Crocker v. Colwell . . . . .	446
Couchman v. Maupin . . . . .	780, 782, 1330	Crockett v. Crain . . . . .	1324, 1327
Coudrey v. Gilliam . . . . .	1122	Croft v. Johnson . . . . .	609
Couilliard v. Eaton . . . . .	1246	Croft, Re . . . . .	846
Course v. Prince . . . . .	1245	Crompton v. Conkling . . . . .	1378
Coursen v. Hamlin . . . . .	895	Cron v. Cron . . . . .	286
Coursen's Appeal . . . . .	705	Cronkhite v. Herrin . . . . .	617
Coursey v. Baker . . . . .	287	Crook v. Davis . . . . .	104
Covington v. Leak . . . . .	40	— v. Rindskoff . . . . .	284, 780
Cowan v. Gill . . . . .	1291, 1308, 1324, 1329	Crooker v. Crooker . . . . .	587, 824, 1323
— v. Iowa State Ins. Co. . . . .	345, 799	Croone v. Bivens . . . . .	833
— v. Kinney . . . . .	189, 273	Cropper v. Coburn . . . . .	845
Cowand v. Pulley . . . . .	102	Crosby v. McDermitt . . . . .	1222
Cowdin v. Hurford . . . . .	858	— v. Nichols . . . . .	322, 778
Cowles v. Garrett . . . . .	126	Cross v. Burlington Nat. Bk. . . . .	499
Cox v. Bodfish . . . . .	1533, 1540	— v. Jackson . . . . .	1532
— v. Delano . . . . .	76	— v. Langly . . . . .	189, 191
— v. Harris . . . . .	630	Crossley v. Taylor . . . . .	1230, 1245
— v. McBurney . . . . .	759	Crosswell v. Lehmann . . . . .	373
— v. Miller . . . . .	162, 1328	Crosthwait v. Ross . . . . .	304
— v. Peters . . . . .	1200	Crottes v. Frigerio . . . . .	1250
— v. Russell . . . . .	1247, 1342	Crouch v. Bowman . . . . .	440
Crabtree v. Randall . . . . .	927	Croughton v. Forrest . . . . .	710
Cragin v. Carleton . . . . .	202	Crow v. Green . . . . .	1245, 1246
— v. Gardner . . . . .	805	— v. Weidner . . . . .	1302
Craig v. Alverson . . . . .	73, 98, 275	Crowell v. Western, etc. Bk. . . . .	195
— v. Chandler . . . . .	163, 1112, 1139	Crowly v. Bank of Kentucky . . . . .	511
— v. Henderson . . . . .	682	Crozier v. Kirker . . . . .	98
— v. Hulschiger . . . . .	331	Crum v. Abbott . . . . .	502
— v. Smith . . . . .	648	Crumless v. Sturgess . . . . .	275
Craige v. Warren . . . . .	98	Crusader, The . . . . .	31
Cram v. Cadwell . . . . .	363	Crutwell v. De Rossett . . . . .	334
— v. Union Bank . . . . .	865	Cuffe v. Murtagh . . . . .	978
Cramer v. Bachman . . . . .	900, 901	Cuille v. Gassen . . . . .	157
Crampton v. Jerkowski . . . . .	1280	Culbertson v. Townsend . . . . .	808
Crandall v. Denny . . . . .	628	Culley v. Edwards . . . . .	11
Crane v. Barry . . . . .	1122	Cullom v. Bloodgood . . . . .	278, 279
— v. French . . . . .	644	Cummings v. Mills . . . . .	31
— v. Roosa . . . . .	1332	Cummins v. Cassily . . . . .	334
— v. Winters . . . . .	162	Cumpston v. McNair . . . . .	21
Crary v. Williams . . . . .	65	Cunliff v. Dyerville . . . . .	894, 897
Crater v. Binninger . . . . .	1229, 1552	Cunningham v. Bragg . . . . .	531
Crawford v. Austin . . . . .	40	— v. Gushee . . . . .	1325, 1327
— v. Baum . . . . .	1343	— v. Ihmsen . . . . .	1239
— v. Collins . . . . .	236	— v. Smith . . . . .	1172, 1175
— v. Spotz . . . . .	917	— v. Smithson . . . . .	443, 444
— v. Thoroughman . . . . .	1233	— v. Sublette . . . . .	275
Credit Mobilier v. Common-wealth . . . . .	74	Curran v. Downs . . . . .	205
Creel v. Bell . . . . .	625	Currier v. Bates . . . . .	369
Cregler v. Durham . . . . .	516, 1259	— v. Hale . . . . .	1237
Crescent Ins. Co. v. Baer . . . . .	227, 859	— v. Rowe . . . . .	1229
— v. Camp . . . . .	345, 808	— v. Sillioaway . . . . .	189
Cresswell v. Oberly . . . . .	7	— v. Webster . . . . .	1228
Creswell v. Blank . . . . .	1320	— v. Woodbridge . . . . .	376, 647
		Curry v. Allen . . . . .	1080, 1084
		— v. Fowler . . . . .	53, 55
		— v. White . . . . .	518
		Curtin v. Patton . . . . .	158

Curtis v. Belknap . . . . .	625	Davis v. Briggs . . . . .	536, 1239, 1249
— v. Cash . . . . .	34, 59	— v. Carroll . . . . .	844
— v. Hollingshead . . . . .	858	— v. Chouteau . . . . .	628
— v. Woodward . . . . .	1328	— v. Christian . . . . .	765, 768, 1291
Curtiss v. Hoyt . . . . .	987	— v. Church . . . . .	802, 803
Curry v. Beveridge . . . . .	1139, 1141	— v. Cook . . . . .	169, 263, 291, 357
Cushing v. Marston . . . . .	627	— v. Davis . . . . .	759, 763, 1150
— v. Smith . . . . .	436	— v. Dodge . . . . .	333
Cushman v. Bailey . . . . .	73	— v. Evans . . . . .	62
Cutler v. Hake . . . . .	347	— v. Gelhaus . . . . .	213, 396
— v. Thomas . . . . .	1534	— v. Grove . . . . .	1325
— v. Winsor . . . . .	81	— v. Holden . . . . .	1535
Cutts v. Gordon . . . . .	664	— v. Howell . . . . .	1324
Cuviz v. Burnett . . . . .	1245	— v. Hubbard . . . . .	629
		— v. Key . . . . .	1085
Dages v. Lee . . . . .	586	— v. Keyes . . . . .	548
Dailey v. Coons . . . . .	98	— v. Kline . . . . .	629
Dakin v. Graves . . . . .	880, 1235	— v. Lane . . . . .	1269
Dale v. Pierce . . . . .	81	— v. Merrill . . . . .	1246
— v. Thomas . . . . .	1232, 1235	— v. Patrick . . . . .	12
Dalton City Co. v. Dalton		— v. Richardson . . . . .	257, 262, 308,
Mfg. Co. . . . .	32		407
— v. Hawes . . . . .	75	— v. Smith . . . . .	327, 765, 769, 770
Daly v. Ericson . . . . .	804	— v. Sowell . . . . .	1292, 1297
Dampf's Appeal . . . . .	1080	— v. Tingley . . . . .	858
Dana v. Conant . . . . .	416	— v. White . . . . .	198
— v. Lull . . . . .	279, 280	— v. Willis . . . . .	541
Daniel v. Daniel . . . . .	341	Davis' Estate v. Desauque . . . . .	536.
— v. De Graffenreid . . . . .	519		585
— v. Nelson . . . . .	536	Day v. Lafferty . . . . .	337
— v. Owens . . . . .	840, 841, 842, 843	— v. Lockwood . . . . .	916, 920, 1145
— v. Toney . . . . .	339	— v. Perkins . . . . .	765
— v. Townsend . . . . .	1325	— v. Stevens . . . . .	22, 34, 59
Daniels, Re . . . . .	281	— v. Wetherby . . . . .	592
Darland v. Rosencrans . . . . .	787	Dayton v. Bartlett . . . . .	895, 1314
Darling v. Boston, etc. R'y		— v. Wilkes . . . . .	997, 1095
Corp. . . . .	106	Deakin v. Underwood . . . . .	258
— v. March . . . . .	299, 533	Deal v. Bogue . . . . .	849
— v. McLelland . . . . .	53	Dean v. Dean . . . . .	734, 1361
Darlington v. Garrett . . . . .	315	— v. McFaul . . . . .	551
Darrow v. Bruff . . . . .	482	— v. Phillips . . . . .	1327
— v. St. George . . . . .	31, 40	— v. Savage . . . . .	661
Dart v. Walker . . . . .	1231	Deane v. Hutchinson . . . . .	841
Daugherty v. Strauss . . . . .	123, 1268,	Dearborn v. Keith . . . . .	1269
	1377, 1378	Deardorf v. Thacher . . . . .	288, 302
Davenport v. Gear . . . . .	1245	De Caussey v. Bailly . . . . .	1323
— v. Runlett . . . . .	413	Deckard v. Case . . . . .	280
David v. Birchard . . . . .	158, 781, 862	Deckard's Case . . . . .	366
Davidson v. Holden . . . . .	17	Decker v. Howell . . . . .	25
— v. Kelly . . . . .	605	Deckert v. Filbert . . . . .	535
— v. Knox . . . . .	455	Deere v. Plant . . . . .	498
— v. Papps . . . . .	1269, 1297	Deering v. Flanders . . . . .	541
— v. Weems . . . . .	802	— v. Metcalf . . . . .	865
— v. Wilson . . . . .	854, 948	Deeter v. Sellers . . . . .	327, 797
Davis v. Skinner . . . . .	1223	Deford v. Reynolds . . . . .	508
Davis v. Allen . . . . .	516	Degan v. Singer . . . . .	273
— v. Berger . . . . .	277	De Greiff v. Wilson . . . . .	669
— v. Blackwell . . . . .	258, 260, 341,	De Grott v. Darby . . . . .	634
	342, 444	De Haven's Appeal . . . . .	1091

Dehority v. Nelson . . . . .	1245	Dillard v. Scruggs . . . . .	47
Deitz v. Regner 258, 270, 288, 291, 307		Dillon v. Brown . . . . .	339
De Jarnette v. McQueen . . . . .	1242	Dils v. Bridge . . . . .	43
Delamour v. Roger . . . . .	821	Dilworth v. Mayfield . . . . .	757, 1039
Delaney v. Dutcher . . . . .	196	Dimon v. Hazzard . . . . .	778
De Leon v. Trevino . . . . .	227	Dimond v. Henderson 926, 928, 948, 949, 1036	
De Lizardi v. Gossett . . . . .	479	D'In villier's Estate . . . . .	1328
Delmonico v. Guillaume . . . . .	759	Dishon v. Schorr . . . . .	359
Delo v. Banks . . . . .	982	Ditts v. Lonsdale . . . . .	289
Demarest v. Rutan . . . . .	1118	Divine v. Mitchum . . . . .	754, 765
Deming v. Colt . . . . .	279, 280, 759	Dix v. Otis . . . . .	183, 500
Demoss v. Brewster . . . . .	647	Dixon v. Barclay . . . . .	275
Demott v. Swain . . . . .	649	— v. Higgins . . . . .	781
Denis v. Saunders . . . . .	81	— v. Hood . . . . .	178
Denithorne v. Hook 99, 123, 182		Doak v. Swan . . . . .	125
Denman v. Dosson . . . . .	541	Doane v. Adams . . . . .	932
Dennis v. Kennedy . . . . .	1532, 1536, 1543, 1547	Dob v. Halsey . . . . .	50, 327, 622
— v. Ray . . . . .	791	Dobson v. Chambers . . . . .	184
Denny v. Cabot . . . . .	14, 38	Dodd v. Bishop . . . . .	98, 519, 605
— v. Metcalf . . . . .	636	— v. Dreyfus . . . . .	601
Densmore v. Mathews . . . . .	174	Dodge v. M'Kay . . . . .	338
Densmore Oil Co. v. Densmore . . . . .	723	Doe v. Tupper . . . . .	334, 336, 338
Dent v. Slough . . . . .	400, 1093	Doggett v. Dill . . . . .	458, 1324
Denton v. Erwin . . . . .	1126	— v. Jordan . . . . .	174
— v. Merrill . . . . .	396	Dolhoude, Succession of 268, 1245	
Denver v. Roane 719, 895, 896, 901, 904, 1079, 1091, 1092		Donaho v. Fish . . . . .	285
Derby v. Gage . . . . .	1210	Donahue v. Caffey . . . . .	656
— v. Gallupp . . . . .	368	— v. McCort . . . . .	925
Desha v. Holland . . . . .	625	— v. McCosh . . . . .	927, 1079, 1131
— v. Smith . . . . .	920, 921	Donaldson v. Bank of Cape Fear . . . . .	754, 768
Detroit v. Robinson . . . . .	318	— v. Kendall . . . . .	333
Deval v. McIntosh . . . . .	1021	Donelson v. Posey . . . . .	824
Devall v. Burbridge . . . . .	701	Doniphan v. Gill . . . . .	339, 425
Deveau v. Fowler . . . . .	1200	Donley v. Hall . . . . .	38
Deveney v. Mahoney 759, 764, 771		Donnell v. Harshe . . . . .	36
Devin v. Harris . . . . .	421	— v. R. R. Co. . . . .	681
Devoss v. Gray . . . . .	121	Donnelly v. Elser . . . . .	334, 336
Dewey v. Dewey . . . . .	759	— v. Ryan . . . . .	309
Dewit v. Staniford . . . . .	1245	Doremus v. McCormick 273, 324, 332	
Dewitt v. Chandler . . . . .	1547	Doris v. French . . . . .	723
Dexter v. Arnold . . . . .	926	Dorsey v. Dashiel . . . . .	1022
De Zeng v. Bailey . . . . .	570	Dortie v. Duzas . . . . .	275, 1064
Diall v. Neuffer . . . . .	162	Doty v. Bates . . . . .	434
Dickerson v. Wilcoxon . . . . .	1138	Dougal v. Cowles . . . . .	443
Dickinson v. Bold . . . . .	958	Dougalot v. Rawlings . . . . .	275
— v. Dickinson 506, 507, 510, 541, 1209		Dougherty v. Van Nostrand 896, 1007, 1010, 1012	
— v. Granger . . . . .	1233	Doughty v. Doughty . . . . .	1271
— v. Legare . . . . .	280, 338	Douglas v. Winslow . . . . .	797
Dickson v. Alexander . . . . .	357, 360	Douglas' Case . . . . .	1284, 1285
— v. Ind. C. M. Co. . . . .	549, 551	Dounee v. Parsons . . . . .	313
Dieckmann v. St. Louis . . . . .	841	Dow v. Phillips . . . . .	287
Dietrich v. Huntington . . . . .	780	— v. Sayward . . . . .	411, 840, 858
Diggs v. Brown . . . . .	759, 766, 771	Dowd v. Troup . . . . .	896
Dill v. Voss . . . . .	498, 1324	Dowdall v. Lenox . . . . .	312
		Dowell v. Mitchell . . . . .	347, 773

Dower v. Stauffer . . .	841	Dupuy v. Sheak . . .	163, 1197
Dowling v. Clarke . . .	1245	Duquesne National Bank v. Mills . . .	843
Downing v. Linville . . .	333	Durand v. Curtis . . .	497
Downs v. Jackson . . .	878	Durant v. Abendroth . . .	474, 475, 487
Dowry v. Roberts . . .	526	— v. Rhener . . .	952
Doyle v. Bailey . . .	1090	— v. Rogers . . .	335, 379, 382
— v. Migner . . .	1535	Durbin v. Barber . . .	1141, 1158
Drake v. Blount . . .	1320	Durham v. Hartlett . . .	1024
— v. Elwyn . . .	174	Duryea v. Burt . . .	25, 824
— v. Moore . . .	767, 845	— Whitcomb . . .	24
— v. Ramey . . .	35	Dwight v. Brewster . . .	105
— v. Taylor . . .	457	— v. Simon . . .	250
— v. Thyng . . .	367, 1206	Dwinel v. Stone . . .	26, 48, 49, 174, 1296
Draper v. Moore . . .	263	Dwinelle v. Edey . . .	1084
— v. Bissell . . .	531	Dyas v. Dinkgrave . . .	625
Drennan v. House . . .	185, 189	Dyer v. Drew . . .	468
— v. London Assurance Co. . .	61	— v. Sutherland . . .	334
Dresbach v. Creditors . . .	378	Eads v. Mason . . .	1329
Dresser v. United Firemen's Ins. Co. . .	345	Eager v. Crawford . . .	53, 54, 55
Drew v. Ferson . . .	894	— v. Price . . .	368
Drewry v. Montgomery . . .	758, 764	Eagle Mfg. Co. v. Jennings . . .	549, 584
Dreyer v. Sander . . .	290	Eakin v. Fenton . . .	869
Drumwright v. Philpot . . .	338	— v. Shumaker . . .	716
Dubourg v. United States . . .	1178	Earbee v. Evans . . .	661
Du Bree v. Albert . . .	798	Earl v. Hurd . . .	179
Duckman v. St. Louis . . .	825	Early v. Burt . . .	575
Dudley v. Littlefield . . .	169, 363	— v. Durborow . . .	945
Duffield v. Brainard . . .	1295	Earon v. Mackey . . .	860
Dulaney v. Elford . . .	174, 647	Eason v. Cherry . . .	705
Dumble v. McIntosh . . .	767	Easter v. Farmers' Nat. Bank . . .	518, 521
Dumont v. Ruepprecht . . .	899, 1266, 1274	Eastman v. Clark . . .	79
Dunbar v. Bullard . . .	172	— v. Wright . . .	636
Duncan, In re . . .	1325	Easton v. Courtwright . . .	1300, 1314
Duncan v. Clark . . .	296	— v. Strother . . .	706
— v. Lewis . . .	501	Easton Nat. Bank v. Wilson . . .	859
— v. Tombeckbee Bank . . .	647	Eaton v. Taylor . . .	532
Dundass v. Gallagher . . .	305, 543, 1301	Eaton's Appeal . . .	1139
Dunham v. Gillis . . .	1225	Ebbert's Appeal . . .	764
— v. Hanna . . .	1327	Ebbinghausen v. Worth Club . . .	1547
— v. Jarvis . . .	1203	Eckerly v. Alcorn . . .	542
— v. Murdock . . .	1344	Edens v. Williams . . .	1281
— v. Rodgers . . .	40	Edgar v. Baca . . .	1124
Dunklin v. Kimball . . .	280	— v. Cook . . .	1353
Dunlap v. Limes . . .	518, 526, 527	— v. Donnally . . .	764
— v. Watson . . .	900, 902, 926	Edgell v. Macqueen . . .	271, 273, 426
Dunlop v. Richards . . .	707	Edgerly v. Gardner . . .	106, 120
Dunman v. Coleman . . .	805	Edgerton v. Preston . . .	207, 237
Dunn v. Jaffray . . .	660	Edick v. Green . . .	496
Dunnell v. Henderson . . .	972, 1172	Edson v. Gates . . .	123, 124
Dunnica v. Clinkscales . . .	433, 441	Edwards v. Entwisle . . .	781
Dunning's Appeal . . .	484	— v. Hughes . . .	858
Dunton v. Brown . . .	156, 157	— v. McEnhill . . .	162
Du Pont v. McLaran . . .	1282	— v. McFall . . .	508
Dupre v. Body . . .	468	— v. McKernan . . .	862
Dupuy v. Leavenworth . . .	759, 769, 774		



Edwards v. Pitzer . . . . .	644	Erwin's Appeal . . . . .	759
— v. Remington 1231, 1244, 1245		Eskins v. Knox . . . . .	878
— v. Thomas . . . . .	163	Espy v. Comer 282, 570, 586, 754,	
— v. Tracy . . . . .	38	766, 768, 772, 1301	
Egberts v. Wood 279, 535, 964		Estabrook v. Messersmith 370, 382	
Egery v. Howard . . . . .	1325	— v. Smith . . . . .	634
Eichelbaum v. Irons . . . . .	121	Estes v. Whipple . . . . .	1245
Einstein v. Gourdin . . . . .	40, 99	Estes, Re . . . . .	1324
Einstman v. Black . . . . .	377	Etheridge v. Binney . . . . .	481
Elancy v. French . . . . .	627	Evans v. Bryan . . . . .	829, 845
Elder v. Hood . . . . .	1230	— v. Carey . . . . .	570
Elderkin v. Winne . . . . .	18	— v. Clapp . . . . .	881
Elder's Appeal . . . . .	1247	— v. Corriell . . . . .	273
Eldred v. Warner . . . . .	1312	— v. Evans . . . . .	1200
Eldridge v. Troost . . . . .	21	— v. Gibson . . . . .	715
Elicott v. Dycke . . . . .	773	— v. Hanson . . . . .	735
Eliot v. Himrod . . . . .	477	— v. Hawley . . . . .	778, 786
Elkin v. Green . . . . .	308	— v. Howell . . . . .	354
Elkinton v. Booth . . . . .	542	— v. Montgomery . . . . .	948, 1145,
Ellicott v. Nichols . . . . .	526	1175	
Ellinger's Appeal . . . . .	440	— v. Winston . . . . .	782, 1324
Elliot v. Stevens . . . . .	748	Everet v. Strong . . . . .	278, 279
Elliott v. Deason . . . . .	905, 1035	Everett v. Chapman 72, 174, 421,	
— v. Dudley . . . . .	414	427	
— v. Ince . . . . .	160	— v. Coe . . . . .	14, 53, 73
— v. Stanley . . . . .	1007	Everhart's Appeal . . . . .	170
Ellis v. Allen . . . . .	367	Everingham v. Ensworth . . . . .	330
— v. Bronson . . . . .	512, 522	Everitt v. Watts . . . . .	1113
— v. Commander . . . . .	1200	Everson v. Gehrman . . . . .	644
— v. Ellis . . . . .	336	Ewing v. Trippe . . . . .	508, 541, 545
— v. Gregory . . . . .	299	— v. Medlock . . . . .	1536
— v. Jameson . . . . .	202	Exchange Bank v. Ford . . . . .	453
Ellison v. Chapman . . . . .	1228	— v. Tracy . . . . .	1301, 1359
Ells v. Bone . . . . .	455	Fabian v. Callahan . . . . .	210, 471
Ellswanger v. Coleman . . . . .	585	Fagan v. Long . . . . .	498, 499, 500
Ellsworth v. Pomeroy . . . . .	37	Fagely v. Bellas . . . . .	424, 672
— v. Tartt . . . . .	106	Fagg v. Hambel . . . . .	570
Elverson v. Leeds . . . . .	518	Fail v. McRee . . . . .	15, 36
Ely v. Hair . . . . .	338	Fairbank v. Leary . . . . .	954, 997
Emanuel v. Bird . . . . .	1319	Fairbanks v. Belknap . . . . .	1288
— v. Draughn . . . . .	17	— v. Newton . . . . .	205
Emerson v. Durand . . . . .	895	Fairchild v. Fairchild . . . . .	758, 764
— v. Harmon . . . . .	296	— v. Valentine . . . . .	1098
— v. Parsons . . . . .	1259, 1261	Fairle v. Bloomingdale . . . . .	162
— v. Senter . . . . .	282	Faler v. Jordan . . . . .	1342
Emery v. Wilson . . . . .	930	Falkner v. Hunt . . . . .	1089
Emmons v. Westfield . . . . .	52	Fall River, etc. Bank v. Stur-	
Endsor v. Simpson . . . . .	125	tevant . . . . .	415
England v. Burt . . . . .	193	Fall River Whaling Co. v.	
— v. England . . . . .	46	Borden . . . . .	169, 759, 764, 771
Englis v. Furniss . . . . .	636, 1251	Fancher v. Bibb Furnace Co. . . . .	277
Enix v. Hays . . . . .	682	Fanning v. Chadwick . . . . .	707, 1232
Ennis v. Williams . . . . .	541	Fanshawe v. Lane . . . . .	486
Ensign v. Briggs . . . . .	754	Fant v. West . . . . .	305
— v. Wands . . . . .	119, 479	Farar v. Shepherd . . . . .	1117
Ensminger v. Marvin . . . . .	290	Farber v. Levi . . . . .	1039
Entwistle v. Mulligan . . . . .	98, 190	Farley v. Moag 780, 783, 841, 1297,	
Epping v. Aiken . . . . .	31, 1085	1298	
Epps v. Dillaye . . . . .	541		

Farman v. Brooks . . .	708	Ferson v. Monroe . . .	790
Farmer v. Samuel . . .	715	Fessler v. Hickernell . . .	1146
Farmer, In re . . .	764	Feurt v. Brown . . .	288, 291, 1232, 1235, 1245
Farmers' Bank v. Bayliss . . .	444, 446	Fick v. Mulholland . . .	275
— v. Ritter . . .	281	Field v. Chapman . . .	780
— v. Smith . . .	6	— v. Fisher . . .	586
Farmers' etc. Bank v. Green . . .	516	— v. Malone . . .	859
Farmers' etc. Co. v. Ross . . .	74	— v. Tenney . . .	178, 179
Farmers' etc. Sav'g Inst'n v. Garesché . . .	1292, 1299	Fielden v. Lahens . . .	414
Farnum v. Ewell . . .	622	Fielding v. Lucas . . .	858
— v. Patch . . .	6	Filbert v. Bickel . . .	356
Farnsworth v. Boardman . . .	482, 496	Filbrun v. Ivers . . .	706, 710, 1209
— v. Whitney . . .	1128	Filley v. Phelps . . .	189, 327, 797, 798, 808, 841, 1291, 1323, 1336
Farr v. Johnson . . .	819	Fillyall v. Laverty . . .	1320
— v. Wheeler . . .	184	Findlay v. Stevenson . . .	359
Farrar v. Haselden . . .	808	Fink v. Patterson . . .	1197
Farrer v. Farrer . . .	894	Finlay v. Fay . . .	866
Farris v. Seisfield . . .	455	— v. Stewart . . .	1235
Farwell v. Davis . . .	665	Finney v. Allen . . .	661
— v. Metcalf . . .	781	— v. Turner . . .	1247
— v. Tyler . . .	1243	Firemen's Ins. Co. v. Floss . . .	622
Faulds v. Yates . . .	758	First Nat'l Bank, Ex parte . . .	308
Faulkner v. Hyman . . .	6	First Nat'l Bank v. Baker . . .	286
— v. Whitaker . . .	629, 858	— v. Bissell . . .	700, 799
Faust v. Burgevin . . .	1022	— v. Breese . . .	855
Faver v. Briggs . . .	847	— v. Carpenter . . .	342
Fawcett v. Osborne . . .	39	— v. Conway . . .	189, 1281
Fay v. Davidson . . .	106	— v. Ellis . . .	518, 519
— v. Duggan . . .	840	— v. Farmers' Nat'l Bank . . .	1291, 1359
— v. Fay . . .	1008	— v. Freeman . . .	174, 236, 288, 289, 303
— v. Finley . . .	749, 1023	— v. Hackett . . .	282, 286
Payette Nat. Bk. v. Kinney . . .	1324, 1325, 1329	— v. Morgan . . .	296, 807, 1293
Federal Bank v. Northwood . . .	296	— v. Newton . . .	496
Feick v. Barbour . . .	181	— v. Tarbox . . .	453
Feigley v. Sponeberger . . .	359	— v. Whitney . . .	483
Felbretch v. Armstrong . . .	541	— v. Wood . . .	284
Felder v. Wall . . .	1139	Fish v. Gates . . .	622
Felichy v. Hamilton . . .	103, 110	— v. Herrick . . .	841, 1323, 1342
Fellows v. Greenleaf . . .	863	Fisher v. Bowles . . .	98
— v. Wyman . . .	532	— v. Hume . . .	310
Felton v. Reid . . .	804	— v. Murray . . .	280
Fenn v. Bolles . . .	1011	— v. Pender . . .	337
— v. Timson . . .	189	— v. Sweet . . .	31, 1245
Fenton v. Black . . .	859	— v. Syfers . . .	782
— v. Folger . . .	1342	— v. Tift . . .	1025, 1379
Ferguson v. Alcorn . . .	34	Fisk v. Copeland . . .	274
— v. Bobo . . .	158	— v. Hills . . .	1330
— v. Gordon . . .	261	Fiske v. Gould . . .	825, 1326
— v. Hass . . .	766	Fitch v. Hall . . .	31
— v. Hite . . .	1126	— v. Harrington . . .	73, 116, 192
— v. King . . .	624	— v. Stamps . . .	350
— v. Thacher . . .	296, 317	Fitchburn v. Boyer . . .	333
— v. Wright . . .	1172	Fithian v. Jones . . .	1154
Ferrero v. Buhlmeier . . .	1265	Fitzgerald v. Christt . . .	794
Ferris v. Burrows . . .	679	— v. Grimmell . . .	6
— v. Thaw . . .	122, 1535		
Ferry v. Meckert . . .	246		

Fitzhugh v. Wilcox . . .	161	Foster v. Fifield . . .	274
Fitzpatrick v. Flannagan . .	1300	— v. Goddard . . .	971
Flagg v. Stowe 6, 8, 820, 830,	1145	— v. Hall . . . 444,	1256, 1323
— v. Swift . . .	1536	— v. Rison . . .	1048, 1124
Flammer v. Green . . .	1273	— v. Ulman . . .	917
Flannagan v. Alekander . .	369	Foulke v. Hitzeroth . .	1142
— v. Shuck 766, 825, 1324		Foulks v. Rhodes . .	1238, 1248
Flannery v. Anderson . .	647	Fountaine v. Urquhart .	1094
Fleischer v. Rentchler . .	1535	Fourth Nat'l Bank v. Alt-	
Fleming v. Dillings . . .	1323	heimer . . . 30, 351,	534
— v. Dunbar . . .	333	— v. Carrollton R. R. .	864, 1037
— v. Lawhorn . . .	338	Fowlber v. Rhodes . .	1223
Flemming v. Prescott . .	299	Fowle v. Harrington . .	803
Fleshman v. Collier . .	182	— v. Torrey . . .	584
Fletcher v. Anderson . .	415, 779	Fowler v. Bailey . . .	758
— v. Brown . . .	878	Fowlkes v. Bowers . .	1324, 1330
— v. Ingram . . .	380	Fox v. Narramore . .	1548
— v. Pollard . . .	1172	— v. Norton . . .	337
— v. Reed . . . 905, 1082,	1255	Fox's Appeal . . .	647, 1323
— v. Van Dusen . . .	1299	Foyle v. Bingham . .	1244
Flint v. Marble Co. . .	22	Francis v. Dickel . .	660
Flood, Ex parte . . .	376	— v. Lavine . . .	1037
Florida Territory v. Redding	1296	— v. Smith . . .	496
Flournoy v. Williams . .	189, 629	Franklyn v. Sprague . .	781
Floyd v. Miller . . .	518	Frank v. Anderson . .	162, 1329
— v. Wallace . . .	430	— v. Beswick . . .	980, 1292
Flynn v. Fish . . .	867	— v. Blake . . .	351
Foellinger v. Leh . . .	510	— v. Peters . . .	831
Fogarty v. Cullen . . .	584, 805, 1318	Franklin v. Hardie . .	407, 427
Fogerty v. Jordan . . .	192	— v. Robinson . . .	895
Fogg v. Greene . . .	202	— v. Tonjourns . .	1297, 1305, 1306
— v. Johnston . . .	1266	Fraser v. Gage . . .	123
— v. Lawry . . .	844	Frayser v. Moore . . .	660
Folds v. Alardt . . .	156	Frazer v. Howe . . .	1361
Folk v. Russell . . .	616	Frazier v. Frazier . .	895, 923
— v. Wilson . . .	186, 585	Freck v. Blackiston . .	711
Foltz v. Powrie . . .	531	Frederick v. Cooper . .	872, 1250
Fontaine v. Lee . . .	519	Freligh v. Miller . .	860
Foot v. Hawkins . . .	859	Freeman v. Bloomfield .	860
— v. Tabir . . .	341	— v. Campbell . . .	663, 1378
Forbes v. Davidson . . .	184	— v. Carhart . . .	649
— v. Garfield . . .	618	— v. Falconer . . .	522
— v. Scannel . . .	280	— v. Freeman . . .	933, 1090
— v. Webster . . .	878, 879	— v. Ross . . .	299
Ford v. Clark . . .	611, 616	— v. Stewart . . .	1319
— v. Kennedy . . .	189	Frees v. Baker . . .	336
— v. McBride . . .	821	Freese v. Ideson . . .	18
— v. Smith . . .	81	French v. Chase . . .	1340
Forde v. Herron . . .	836	— v. Donohue . . .	167
Forde v. Scribner . . .	296	— v. Lovejoy . . . 370,	1337
Fordyce v. Shriver . .	257, 917	— v. Rowe . . .	366
Forkner v. Stuart . . .	340	Frentress v. Markle . .	577
Forney v. Adams . . .	328, 329	Friend v. Duryee . . .	304
Forrer v. Forrer . . .	716	Frigerio v. Crottes . .	1144
Forrester v. Oliver . .	808, 809, 1291	Frink v. Ryan . . .	1125
Fortune v. Brazier . .	630	Fripp v. Williams . . .	385
Foster's Appeal . . .	768, 769	Frith v. Lawrence . .	824
Foster v. Andrews . . .	413	Fromme v. Jones . . .	278
— v. Barnes . . .	691, 766	Fronebarger v. Henry .	339

Frost v. Hanaford . . .	407	Gardiner v. Battaille . . .	1259
— v. Shackelford . . .	666	— v. Fargo . . .	863, 1246
— v. Walker . . .	202	Gardner v. Baker . . .	571
Frothingham v. Barney . . .	1555	— v. Conn . . .	587
— v. Seymour . . .	144	— v. N. W. M'f'g Co. . .	273
Froun v. Davis . . .	372	Garland v. Agee . . .	528
Fry v. Potter . . .	1232, 1243	Garnett v. Richardson . . .	6
Fry, Treasurer, In re . . .	1532, 1537	Garnier v. Gebhard . . .	870
Frye v. Sanders . . .	261	Garretson v. Weaver . . .	1191
Fullam v. Abrahams . . .	1324, 1327, 1328	Garrett v. Robinson . . .	1144
Fuller v. Benjamin . . .	1037	Garvin v. Paul . . .	848
— v. Miller . . .	899	Gaston v. Kellogg . . .	895
— v. Nelson . . .	628	Gates v. Bennett . . .	346
— v. Percival . . .	415, 1186	— v. Fisk . . .	236, 617
— v. Rowe . . .	497	— v. Fraser . . .	1083, 1115
Fuller Electric Co. v. Lewis . . .	1325	— v. Hughes . . .	246
Fullmer's Appeal . . .	930	— v. Pollock . . .	334
Fulton v. Central Bank . . .	529	Gathright v. Burke . . .	514
— v. Hughes . . .	826	Gauger v. Pantz . . .	881, 1250
— v. Williams . . .	604	Gaut v. Reed . . .	979
Fulton's Appeal . . .	879	Gautier Steel Co., In re . . .	470, 487
Funck v. Haskell . . .	930	Gavin v. Walker . . .	56, 258, 312, 401
Funk v. Leachman . . .	1098	Gay v. Bowen . . .	537
Furber v. Carter . . .	98	— v. Johnson . . .	440, 1334
Furness, Re . . .	496	— v. Palmer . . .	800
		— v. Seibold . . .	208, 209
		— v. Waltman . . .	277
Gaar v. Huggins . . .	546	Gaylord v. Imhoff . . .	845
Gable v. Williams . . .	1300	Geddes' Appeal . . .	1064, 1072
Gadsden v. Carson . . .	1323	Geery v. Cockroft . . .	369
Gaffney v. Hoyt . . .	180	— v. Geery . . .	1297
Gage v. Canada Pub'g Co. . .	1009	Geheebe v. Stanby . . .	662
— v. Parmelee . . .	925, 948, 949, 1072, 1124, 1128, 1129	Genese v. Cooper . . .	999
— v. Rollins . . .	622, 623	George v. Grant . . .	482, 486
Gaines v. Catron . . .	766	— v. Tate . . .	432
— v. Coney . . .	1143	— v. Wamsley . . .	781
Gaither v. Caldwell . . .	668	Geortner v. Trustees . . .	1200
Galbraith v. Gedge . . .	754, 765, 773	Gerard v. Basse . . .	334
Galbraith's Estate . . .	901	— v. Bates . . .	842, 843, 852, 1035
Gale v. Miller . . .	317, 518, 521	— v. Gateau . . .	895, 896, 1274, 1279
Gallagher's Appeal . . .	327, 1300	Gerhardt v. Swaty . . .	376
Gallicott v. Planters' & Me- chanics' Bank . . .	531, 545	German v. Schloth . . .	628
Gallot v. McCluskey . . .	622	Gernon v. Hoyt . . .	236
Galloway v. Hughes . . .	318, 956	Getchell v. Foster . . .	103, 322
Gallop v. Newman . . .	52	Getz v. Phila., etc. R. R. Co. . .	776
Galt v. Calland . . .	425	Geyer v. Carpenter . . .	1232
Galway v. Fullerton . . .	862	Gibbs v. Bates . . .	309
Gammon v. Huse . . .	523	Gibson v. Cunningham . . .	1067
Gannett v. Cunningham . . .	526	— v. Moore . . .	1236
Gano v. Samuel . . .	290	— v. Ohio Farina Co. . .	1252
Gansevoort v. Kennedy . . .	1256	— v. Stevens . . .	82, 841, 848
— v. Williams . . .	413	— v. Stone . . .	37, 55
Ganson v. Lathrop . . .	1323	— v. Warden . . .	335
Gantt v. Gantt . . .	172	Giddings v. Palmer . . .	833
Ganze v. Fricke . . .	104	Gilbank v. Stevenson . . .	34
Gard v. Clark . . .	536	Gilbert v. Crystal F. Lodge . . .	376
Gardenshire v. Smith . . .	42	— v. Whidden . . .	178, 182
		Gilchrist v. Brande . . .	190, 379, 512, 541, 542

Gildersleeve v. Mahoney . . . . .	296	Goodnow v. Smith . . . . .	571
Gilhooley v. Hart . . . . .	895, 921	Goodspeed v. South Bend Plow Co. . . . .	511, 518
Gill v. Ferris . . . . .	40, 238	— v. Wiard Plow Co. . . . .	518, 545,
— v. Geyer . . . . .	932		549
— v. Kuhn . . . . .	14	Goodwin v. Einstein . . . . .	702
— v. Lattimore . . . . .	781, 845	— v. Richardson . . . . .	764, 1324, 1342
— v. Wilson . . . . .	700, 913, 919	Gordon v. Bankard . . . . .	189
Gillaspy v. Peck . . . . .	1340, 1342	— v. Buchanan . . . . .	258
Gille v. Hunt . . . . .	763	— v. Freeman . . . . .	320
Gillett v. Hall . . . . .	1082	— v. Gordon . . . . .	760
— v. Walter . . . . .	647	— v. Janney . . . . .	631
Gillisse v. Gibson . . . . .	778	— v. Joslin . . . . .	589
Gilman v. Cosgrove . . . . .	630	— v. Kennedy . . . . .	771
— v. Vaughan . . . . .	925	— v. Tyler . . . . .	700
Gilmore v. Merrell . . . . .	57	Gordon's Estate . . . . .	1324, 1329
— v. N. Am. Land Co. . . . .	847, 851	Gorham, In re . . . . .	609, 1376, 1377
Gilpin v. Temple . . . . .	174, 183	German v. Russell . . . . .	987, 1276
Giovanni v. Nat. Bank . . . . .	845	Gott v. Dinsmore . . . . .	1546
Given v. Albert . . . . .	429	Gould v. Gould . . . . .	310, 626
Glass v. McDonald . . . . .	352, 360	Goulding v. Bain . . . . .	1203
Glasscock v. Smith . . . . .	1302	Gover v. Hall . . . . .	1261
Gleason v. Clark . . . . .	537	Govham v. Farson . . . . .	1190
— v. Van Aernam . . . . .	1085, 1124,	Gowan v. Jeffries . . . . .	1201, 1203, 1268
	1133	Grabenheimer v. Rindskoff . . . . .	98
— v. White . . . . .	1250	Grady v. Robinson . . . . .	68, 335, 337,
Glenn v. Arnold . . . . .	1378		510
— v. Gill . . . . .	104, 1323	Graeff v. Hitchman . . . . .	444
— v. Hebb . . . . .	1087	Graff v. Kinney . . . . .	162
Glover v. Hembree . . . . .	684, 895, 1082,	Grafton Bank v. Moore . . . . .	179, 189
	1143, 1144, 1172	Graham v. Harris . . . . .	636
— v. Tuck . . . . .	1223	— v. Holt . . . . .	1245
Glynn v. Phetteplace . . . . .	830, 835	— v. Meger . . . . .	337
Goble v. Howard . . . . .	1084	— v. Taggart . . . . .	292
Goddard v. Pratt . . . . .	523	Gram v. Seaton . . . . .	337
— v. Renner . . . . .	773	Granger v. McGilvra . . . . .	526
Godfrey v. Templeton . . . . .	1172, 1212	Grant v. Bryant . . . . .	929, 1206
— v. White . . . . .	766, 895, 896, 923,	— v. Crowell . . . . .	287, 864
	971, 1079, 1142	— v. Holmes . . . . .	570
Goell v. Morse . . . . .	124, 127	— v. Masterton . . . . .	1172
Goembel v. Arnett . . . . .	826	— v. Williams . . . . .	839, 1246
Goepper v. Kinsinger . . . . .	765, 771	Graser v. Stellwagen . . . . .	367
Golden State & Miners' Iron Works v. Davidson . . . . .	647, 1327	Grasswett v. Connolly . . . . .	789
Goldman v. Page . . . . .	663	Gratz v. Bayard . . . . .	1291
Goldsborough v. McWilliams . . . . .	1245	— v. Stump . . . . .	660
Goldsmith v. Sachs . . . . .	960, 1217	Graves v. Boston, etc. Ins. Co. . . . .	345
Goldtree v. Swinford . . . . .	210	— v. Drane . . . . .	647
Goll v. Hubbell . . . . .	286	— v. Hall . . . . .	280
Gomersall v. Gomersall . . . . .	1245	— v. Kellenberger . . . . .	304
Good v. McCartney . . . . .	40	— v. Merry . . . . .	531, 545
Goodbar v. Cary . . . . .	1324	Gray v. Brown . . . . .	569
Goodburn v. Stevens . . . . .	742, 1291, 1306	— v. Cropper . . . . .	402
Goode v. Linecum . . . . .	482	— v. Fretwell . . . . .	186
— v. McCartney . . . . .	327	— v. Gibson . . . . .	15, 472
Gooden v. Morrow . . . . .	551	— v. Green . . . . .	1117
Goodenough v. Duffield . . . . .	270	— v. Larrimore . . . . .	1037
Goodenow v. Jones . . . . .	489, 501	— v. Palmer . . . . .	117, 171, 430
Gooder v. Cary . . . . .	1327	— v. Portland Bank . . . . .	705
Goodman v. White . . . . .	260		

Gray v. Steedman . . .	423	Groesbeck v. Brown . . .	642
— v. Ward . . .	287	Grooves v. Tollman . . .	61
Grazebook v. McCreddie . .	642	Grossini v. Perazzo . . .	1039
Greathouse v. Greathouse . .	683	Grosvenor v. Austin . . .	1325
Great Western Tel. Co., In re	869	Grouch v. Stenger . . .	1178
Greeley v. Wyeth . . .	320	Grove v. Fresh . . .	1138, 1176
Green v. Caulk . . .	199	Groves v. Miles . . .	914
— v. Chapman . . .	636	Grubb v. Cottrell . . .	882
— v. Pyne . . .	660	Grund v. Van Vleck . . .	374
— v. Ross . . .	844	Gruner v. Stucken . . .	357, 407
Greene v. Breck . . .	693	Gueringer v. Creditors	1324, 1328
— v. Ferrie . . .	933	Guice v. Thornton	296, 313, 952.
Greenleaf v. Quincy . . .	616		961
Greenwald v. Kaster . . .	570, 571	Guilbeau v. Melancon . . .	764
Greenwood v. Brodhead . . .	784	Guild v. Leonard . . .	785
— v. Sheldon . . .	1224	Guillon v. Peterson	385, 396, 469,
— v. Sias . . .	190		470, 473, 481
— v. The Hampshire Mfg.		Gulick v. Gulick	270, 592, 1232
Co. . . .	470	Gullat v. Tucker . . .	359
Gregg v. Brower . . .	1131	Gullich v. Alford . . .	1068
— v. Fisher	290, 307, 312, 348,	Gumbel v. Abrams . . .	98
	408	Gunn v. Central R. R. . .	166
— v. James . . .	319	Gunnell v. Bird . . .	1144
Gregg Township v. Half		Gunter v. Jarvis . . .	804
Moon Township . . .	50	Guptil v. McFee . . .	845
Gregory v. Dodge . . .	21	Gurler v. Wood . . .	374
— v. Harmon . . .	648	Gurr v. Martin . . .	44, 1326
— v. Martin . . .	192	Guyton v. Flack . . .	782, 1203
— v. Menefee . . .	895, 1303	Guzzan v. Bebee . . .	660
Gregory's Appeal . . .	1324	Gwin v. Selby . . .	780
Gribbin v. Thompson . . .	659	Gwinn v. Rooker . . .	337
Gribble v. Harry . . .	98, 427	Gwynn v. Duffield . . .	377
Gridley v. Conner	534, 924, 1036,	— v. Gwynn . . .	162
	1206	Gwynne v. Estes . . .	1299, 1324
— v. Dole	1229, 1242, 1250, 1552	Gyger's Appeal . . .	925
Grieff v. Bondonsquie . . .	98		
— v. Kirk . . .	648	Haas v. Roat . . .	74, 174
Grier v. Hood . . .	644	— v. Shaw . . .	162
Griffey v. Northcutt . . .	771	Haben v. Harshaw . . .	360, 780
Griffie v. Maxey . . .	757	Habicht v. Pemberton . .	1545
Griffin v. Doe . . .	178	Hacker v. Johnson . . .	852
— v. Orman . . .	1021	Hackett v. Multnomah R'y	
— v. Samuel . . .	457	Co. . . .	166
Griffith v. Buck . . .	833, 1019	Hackley v. Hastie . . .	537
— v. Buffum . . .	33, 429	Haddock v. Crocheron . .	519
— v. Chew . . .	636	— v. Grinnell Mfg. Co.	469, 473,
— v. Hill . . .	1248		477
Griggs v. Clark . . .	821, 1139, 1309	Hadley v. Milligan . . .	773
Grigsby v. Nance . . .	1228	Hagar v. Mounts . . .	298
Grim's Appeal . . .	1310, 1311	— v. Stone . . .	625, 665
Grinman v. Baton Rouge Co.	545	Hagendobler v. Lyon	535, 628, 677,
Grissom v. Moore . . .	766, 767		828
Griswold v. Haven . . .	366	Hager v. Graves . . .	327
— v. Hill . . .	1276	Hagerman v. Farr . . .	781
— v. Waddington . . .	154, 1268,	Haggarty v. Granger . . .	280
	1269, 1284	Haggerty v. Foster . . .	475
Grobbs's Appeal . . .	755	— v. Taylor . . .	486
Groenendyke v. Coffeen . .	1047,	Hahn v. Cook . . .	683
	1128, 1129, 1182, 1139	— v. St. Clair Savings Co.	273

Haile v. York . . . . .	65	Hanna v. Flint . . . . .	40
Haines v. Hollister . . . . .	1036	— v. Wray . . . . .	810
Haldeman v. Bank of Mid-		Hannah v. Baylor . . . . .	99
dletown . . . . .	296, 312	Hanover Fire Ins. Co. v. Ger-	
Halderman v. Halderman . . . . .	1250	mania Fire Ins. Co. . . . .	1205
Hale v. Brennan . . . . .	181	Hanover Nat. Bank v. Klein . . . . .	833, 1330
— v. Henric . . . . .	764		
— v. Van Saum . . . . .	647	Hanover Vulcanite Co. v. .	
— v. Wilson . . . . .	1230	Nathanson . . . . .	573
Haley v. Bellamy . . . . .	277	Hanson v. Dodge . . . . .	258
— v. Case . . . . .	377	— v. Watson . . . . .	858
Hall v. Claggett . . . . .	526, 797, 798, 949, 1047, 1116	Hanway v. Robertshaw . . . . .	800, 808
— v. Cook . . . . .	660	Hapgood v. Cornevell . . . . .	833, 834
— v. Edson . . . . .	40	Hard v. Mulligan . . . . .	287
— v. Green . . . . .	660	Hardeman v. Tabler . . . . .	468
— v. Jones . . . . .	575, 583, 592	Hardenburgh v. Bacon . . . . .	352
— v. Lanning . . . . .	536	Hardy v. Donnelan . . . . .	852
— v. Logan . . . . .	1245, 1252	— v. Mitchell 786, 788, 1323, 1324, 1341	
— v. Lonkey . . . . .	1080, 1209	— Norfolk Mfg Co. . . . .	319, 759
— v. Lyons . . . . .	663	Hare v. Commonwealth . . . . .	848
— v. Sannoner . . . . .	951, 955, 1246	Harkey v. Tillman . . . . .	367, 778, 1221
— v. Sheibley . . . . .	169	Harp v. Tomlinson . . . . .	498
— v. Younts . . . . .	271, 272, 376	Harper v. Fox . . . . .	693
Hallack v. Marsh . . . . .	277	— v. Lamping . . . . .	1176
Haller v. Williamowicz . . . . .	913, 1230	— v. Raymond . . . . .	868, 1538
Hallet v. Desbau . . . . .	79	— v. Wrigley . . . . .	330
Hallett v. Cunmton . . . . .	1094	Harris v. Harris . . . . .	1242
Halliday v. Bridewell . . . . .	40, 175	— v. Hillegass . . . . .	22, 32, 1048
— v. McDougal . . . . .	179, 454	— v. Lindsay . . . . .	585
Halloway v. Brinkley . . . . .	36	— v. Miller . . . . .	423
Halls v. Coe . . . . .	330	— v. Murray . . . . .	845
Halsey v. Norton . . . . .	1268, 1269	— v. Pearce . . . . .	249, 366, 679, 802
— v. Whitney . . . . .	278	— v. Peabody . . . . .	1328
Halstead v. Schmelzel . . . . .	1243	— v. Phillips . . . . .	839
— v. Shepard . . . . .	279, 535	— v. Schultz . . . . .	465
Hamersley v. Lambert . . . . .	600	— v. Sessler . . . . .	56, 98
Hamill v. Hamill . . . . .	1201	— v. Visscher . . . . .	845
— v. Purviss . . . . .	341	Harris, In re . . . . .	895
— v. Willett . . . . .	786	Harris' Succession . . . . .	904
Hamilton, In re . . . . .	165, 1329	Harrison v. Clare . . . . .	570
Hamilton v. Buxton . . . . .	659	— v. Dewey . . . . .	1130, 1174
— v. Hamilton . . . . .	1235, 1261, 1539	— v. Farrington . . . . .	1124
— v. Hodges . . . . .	332	— v. McCormick . . . . .	238, 659, 660
— v. Seaman . . . . .	531	— v. Righter . . . . .	1093
— v. Summers . . . . .	290, 313, 536	— v. Sterry . . . . .	278, 279, 280
Hamilton's Appeal . . . . .	455	Harryman v. Rogers . . . . .	271
Hamlin, In re . . . . .	1377	Hart v. Auger . . . . .	1360
Hammersmith v. Hilton . . . . .	271, 622	— v. Clark . . . . .	835
Hammond v. Aiken . . . . .	513	— v. Finnigan . . . . .	1124
— v. Paxton . . . . .	757	— v. Kelly . . . . .	53
— v. St. John . . . . .	806	— v. Tomlinson . . . . .	559
Hamper's Appeal . . . . .	897	— v. Withers . . . . .	334
Hancock v. Hintrager . . . . .	98	— v. Woodruff . . . . .	270
Handlin v. Davis . . . . .	66	Hartley v. Kirlin . . . . .	527
Handlin, Re . . . . .	846	— v. White . . . . .	370
Hankey v. Becht . . . . .	48, 116	Hartman v. Woehr . . . . .	64, 1275
Hanks v. Baber . . . . .	1124, 1148, 1232, 1241	Hartness v. Thompson . . . . .	664
		Hartung v. Siccardi . . . . .	683

Hartzler v. Tootle . . .	285	Hayward v. French . . .	312
Harvey v. Childs . . .	31	Haywood, etc. Co. v. Har-	
— v. McAdams . . .	374	mon . . .	277
— v. Pennypacker . . .	760, 1083	Hazard v. Caswell . . .	1009
— v. Varney . . .	909, 1086, 1190	— v. Hazard . . .	15, 35, 1094
Hasberg v. McCarty . . .	702	Hazelhurst v. Pope . . .	571, 1239, 1249
Hasbrouck v. Childs . . .	945	Head v. Sleeper . . .	295
Haskell v. Adams . . .	1242	Headley v. Shelton . . .	869
Haskill v. Johnson . . .	1327	Heard v. Pulaski . . .	930
Haskins v. Alcott . . .	631	Heart v. Walsh . . .	526
— v. Burr . . .	64	Heartt v. Corning . . .	1048, 1172
— v. D'Este . . .	633	— v. Walsh . . .	320, 325
Haskinson v. Elliott . . .	308, 338, 362	Heaton v. Cincinnati R. R. Co.	629
Haslet v. Street . . .	642	Heath v. Goslin . . .	1535
Haslett v. Wotherspoon . . .	6	— v. Gregory . . .	336
Hassard v. Smith . . .	160	— v. Waters . . .	808, 895, 900, 1092
Hasselman v. Douglass . . .	865	Heavilon v. Heavilon . . .	1245
Hastings v. Hopkinson . . .	179, 456,	Hebertson v. Jepherson . . .	1319
	479	Heckert v. Fegeley . . .	80
Hastings Bank v. Hibbard . . .	428	Hedge's Appeal . . .	15, 1532, 1534
Hatch v. Foster . . .	779	Hedges v. Armistead . . .	647
— v. Wood . . .	665	Hedrick v. Osborne . . .	654
Hatchett v. Blanton . . .	496, 759, 1281	Heenan v. Nash . . .	443
Hatheway's Appeal . . .	267, 275	Hefferman v. Brenham . . .	649
Hatton v. Stewart . . .	357	Heffner v. Palmer . . .	110
Hauff v. Howard . . .	764	Heffron v. Hanaford . . .	272, 273, 299,
Haughey v. Strickler . . .	191		300
Havana, etc. R. R. Co. v.		Heflebower v. Buck . . .	1205
Walsh . . .	428	Heft v. Bosford . . .	336
Haviland v. Chace . . .	469, 474, 475	Hegeman v. Hegeman . . .	209, 1001,
Haven v. Wakefield . . .	1251		1006, 1007
— v. White . . .	636	Heidenheimer v. Franklin . . .	496
Havens v. Hussey . . .	280	Heimstreet v. Howland . . .	14, 78
Hawes v. Dunton . . .	296	Heineman v. Hart . . .	782
— v. Tillinghast . . .	18	Heirn v. McCaughan . . .	377
Hawk v. Johnston . . .	583	Heise v. Barth . . .	48
Hawks v. Hinchcliff . . .	607	Hellman v. Mendel . . .	902
Hawkins v. Appleby . . .	382	Henderson v. Barbee . . .	337
— v. Hastings Bank . . .	347	— v. Haddon . . .	853
— v. Lasley . . .	611	— v. Nichols . . .	772
— v. Lee . . .	270, 275	— v. Wadsworth . . .	1362
— v. McIntyre . . .	35	Hendrick v. Gunn . . .	16
Hawley v. Campbell . . .	1378	Hendrie v. Berkowitz . . .	299
— v. Hurd . . .	632	Henkel v. Heyman . . .	466, 472
— v. Keeler . . .	39, 126	Henn v. Walsh . . .	126
Hawn v. Land Co. . . .	324	Hennegin v. Wilcoxen . . .	1250
Hayden v. Hill . . .	259	Hennesey v. Farrally . . .	475
Haydon v. Nicoletti . . .	738	Hennessey v. Bank . . .	281
Hayes v. Baxter . . .	355	Henry, In re . . .	1377
— v. Bement . . .	479, 485	Henry v. Anderson . . .	340, 798
— v. Hever . . .	280, 484, 1095, 1199	— v. Bassett . . .	896
— v. Knox . . .	574	— v. Henry . . .	1338
Hayner v. Crow . . .	297	Henry County v. Gates . . .	336
Haynes v. Brooks . . .	283, 285, 286,	Henshaw v. Root . . .	184
	1301, 1332	Hensley v. Bagdad Sash Fac-	
— v. Carter . . .	548	tory Co. . .	455, 615
— v. Seachrest . . .	338	Hepburn v. Curts . . .	637
Hays v. Fish . . .	930	Heraldson v. Campbell . . .	660
Hay's Appeal . . .	754, 1145	Herbert v. Hanrick . . .	337



Herbert v. Odlin . . . . .	350, 351	Himmelright v. Johnson . . . . .	296
Hernauns v. Davigneaud . . . . .	126	Hine v. Bowe . . . . .	281, 284
Hernott v. Kersey . . . . .	637	Hines v. Dean . . . . .	625, 797
Heroy v. Van Pelt . . . . .	509	Hinkle v. Reid . . . . .	881
Herrick v. Ames . . . . .	705	Hinman v. Little . . . . .	101
— v. Conant . . . . .	644	Hinton v. Odenheimer . . . . .	880
Hershfield v. Claffin . . . . .	840, 843	Hirsch v. Adler . . . . .	1040
Hertz v. Clark . . . . .	1125, 1131	— v. Vanuxen . . . . .	473
Herzog v. Sawyer . . . . .	343	Hiscock v. Phelps . . . . .	759, 764, 771
Heshion v. Julian . . . . .	43	Hitchcock v. St. John . . . . .	281
Heslin v. Fay . . . . .	966	Hitchings v. Ellis . . . . .	38
Hess v. Werts . . . . .	1534, 1535	Hite v. Hite . . . . .	903, 927
Hester v. Lumpkin . . . . .	297	Hite Nat. Gas Co.'s Appeal . . . . .	477
Hewes v. Bayley . . . . .	280	Hixon v. Pixley . . . . .	512, 523, 524
Hewett v. Lewis . . . . .	123, 1116	Hoard v. Clum . . . . .	1292, 1297
Hewitt v. Hatch . . . . .	1536	Hoare v. Hindley . . . . .	1259
— v. Kuhl . . . . .	1182	Hobart v. Ballard . . . . .	1203
— v. Northrup . . . . .	780	— v. Lemon . . . . .	162
— v. Patrick . . . . .	644	Hobbs v. McLean . . . . .	609, 1329
— v. Rankin . . . . .	758, 764	— v. Wilson . . . . .	882
— v. Sturdevant . . . . .	139	Hoboken Bank v. Beckman . . . . .	270
Hibbler v. De Forest . . . . .	304	Hobson v. Porter . . . . .	334
Hibernia Fire-Engine Co. v. . . . .		Hodge v. Twitchell . . . . .	705, 709
Commonwealth . . . . .	1555	Hodges v. Black . . . . .	1079
Hibour v. Reeding . . . . .	170	— v. Bullock . . . . .	1138
Hickman v. Kunkle . . . . .	413	— v. Dawes . . . . .	40
— v. Reineking . . . . .	274, 413	— v. Harris . . . . .	278, 279
Hicks v. Branton . . . . .	659	— v. Holeman . . . . .	828, 835
— v. Cram . . . . .	98, 104	— v. Ninth National Bank . . . . .	258
— v. Maness . . . . .	659	— v. Parker . . . . .	923
— v. Wyatt . . . . .	496	Hodgman v. Smith . . . . .	40
Hickson v. McFaddin . . . . .	778	Hodgson v. Baldwin . . . . .	6, 7, 888, 890
Hier v. Odell . . . . .	518	Hoeflinger v. Wells . . . . .	311, 314, 445
Higgins v. Armstrong . . . . .	258, 1538,	Hoffman v. Slembrasser . . . . .	1205
— v. Cartwright . . . . .	1539	Hog v. Ellis . . . . .	479
— v. Rockwell . . . . .	327	Hogan v. Calvert . . . . .	1227
Highland v. Highland . . . . .	784	— v. Reynolds . . . . .	323
Hill v. Beach . . . . .	765, 797, 847, 1324	Hogg v. Ellis . . . . .	1086
— v. Clarke . . . . .	1247	— v. Orgill . . . . .	290
— v. Marcy . . . . .	585, 586	Hogle v. Lowe . . . . .	758
— v. Marsh . . . . .	635	Holbrook v. Obirne . . . . .	40
— v. Matta . . . . .	897	— v. St. Paul F. & M. Ins. . . . .	7, 237
— v. McNeil . . . . .	808	Co. . . . .	517
— v. Packard . . . . .	623	Holdane v. Butterworth . . . . .	301
— v. Palmer . . . . .	1217, 1231	Holden v. Bloxum . . . . .	44
— v. Trainer . . . . .	573, 1379	— v. French . . . . .	551
— v. Treat . . . . .	1298	— v. McFaul . . . . .	746, 1007, 1010
— v. Wiggins . . . . .	848	— v. Peace . . . . .	776, 926
Hillborn v. Covenant Pub. . . . .		Holfield v. White . . . . .	25, 845
Co. . . . .	1197	Holladay v. Elliott . . . . .	1086
Hilliker v. Loop . . . . .	625	Holland v. Butler . . . . .	629
Hillisburg v. Burthe . . . . .	926	— v. Drake . . . . .	280
Hillman v. Moore . . . . .	1339	— v. Fuller . . . . .	800, 808
Hillock v. Traders' Ins. Co. . . . .	318,	— v. Long . . . . .	541
— v. . . . .	345	Hollenback v. More . . . . .	400
Hills v. Bailey . . . . .	432	Holliday v. Elliott . . . . .	1267
Hilton v. McDowell . . . . .	271	— v. Union, etc. Co. . . . .	469, 477
— v. Vanderbilt . . . . .	528	Hollis v. Staley . . . . .	785

Hollister v. Barkley . . .	915	Hotchkiss v. English . . .	306, 447
Hollister, In re . . .	1324	— v. Lyon . . .	275
Holloway v. Brinkley . . .	25	Hot Springs R. R. Co. v. . .	
— v. Turner 518, 526, 825, 901, . . .		Trippe . . .	23
925, 1118, 1143		Houseal's Appeal . . .	1323
Holman v. Nance . . .	812	Houser v. Irvine . . .	617
Holmes v. Burton . . .	447	Housman v. Weir . . .	124
— v. Caldwell . . .	551	Houston v. Brown . . .	1250
— v. De Camp . . .	805	— v. Stanton . . .	118
— v. Hawes . . .	778	Hovey v. Cassels . . .	317
— v. Hubbard . . .	1020	Howard v. McLaughlin . . .	859
— v. Kortlander . . .	354	— v. Patrick . . .	181, 1250
— v. McCray . . .	1259	— v. Priest . . .	767
— v. McDowell . . .	1345	Howard, Ex parte . . .	381
— v. Moon . . .	759, 763	Howe v. Howe . . .	48
— v. Old Colony Railroad . . .		— v. Kane . . .	608
Co. . .	80	— v. Patterson . . .	551
— v. Porter . . .	200, 481	— v. Searing . . .	1009
— v. Self . . .	754	— v. Thayer . . .	510
— v. Shands . . .	527	Howell v. Adams . . .	510
— v. U. S. Ins. Co. . .	138	— v. Com. Bank of K'y . . .	780
— v. Winchester . . .	767, 846	— v. Harvey . . .	915, 1037, 1067,
Holt v. Kernodle . . .	50, 622	1256, 1265, 1267, 1273, 1274	
— v. Simmons 258, 287, 307, 346, . . .		— v. Reynolds . . .	626
510, 1079		— v. Sewing Machine Co. . .	296
Holtgreve v. Wintker . . .	541, 544	— v. Teel . . .	1335
Holton v. Holton . . .	1324, 1327	Hower's Appeal . . .	948
Holt's Appeal . . .	755	Howland v. Davis . . .	350
Holyoke v. Mayo . . .	1245	Hoyt v. Hoyt . . .	767, 845
Homer v. Abbe . . .	1038	— v. McLaughlin . . .	1133
— v. Wood . . .	330	— v. Murphy . . .	681
Honegger v. Wettstein . . .	609, 1197, 1378	— v. Sprague . . .	827, 1154, 1311
Honore v. Colmesnil 820, 926, 950, . . .		Hoxie v. Carr . . .	757
1206		— v. Chaney . . .	1009
Hood v. Spencer . . .	1021	Hubball v. Skiles . . .	808
Hook v. Stone . . .	280	Hubbard v. Curtis . . .	1139, 1333
Hooley v. Gieve . . .	807, 825, 1308, 1327	— v. Guild . . .	526
Hoopes v. McCan . . .	601	— v. Pace . . .	258
Hope v. Ferris . . .	1245	Hubbell v. Buhler . . .	962, 1255
Hopfensack v. Hopfensack . . .	1206	— v. Woolf . . .	65, 445
Hopkins, Ex parte . . .	285, 845	Hubble v. Perrin . . .	1324
Hopkins v. Carr . . .	575, 592	Huckabee v. Nelson . . .	63
— v. Forsythe . . .	138	Hudgins v. Lane . . .	672
— v. Johnson . . .	499	Hudson v. Barrett . . .	1097
— v. Smith . . .	187	— v. McKenzie . . .	279, 280
— v. Thomas . . .	344	— v. Neil . . .	767
— v. Watt . . .	1236	— v. Simon . . .	186
Hopper v. Lewis . . .	644	Huff v. Lutz . . .	1304
Horbach v. Huey . . .	633	Huffman v. Copeland . . .	162, 164
Horn v. Newton City Bank . . .	318	Huggard v. Lehman . . .	1278
Horsey v. Heath . . .	300, 1320	Hughes v. Boring . . .	623
Horton v. Child . . .	337, 606	— v. Ellison . . .	280
Horton Mfg. Co. v. Horton . . .	1009	— v. McDill . . .	663
Horton's Appeal . . .	1281	— v. Waldo . . .	500
Hosack v. Rogers . . .	571, 607	— v. Walker . . .	629
Hosmer v. Burke . . .	456	Hughes, Re . . .	846
Hotchin v. Kent . . .	260	Huguley v. Morris . . .	31
		Huiskamp v. Moline Wagon . . .	
		Co. . .	781

Hulett v. Fairbanks	119, 124, 706	Ihmsen v. Negley	298
Hulse's Estate	862, 1124	Illiff v. Brazil	125
Human v. Cuniffe	339	Illinois, etc. R. R. Co. v. Owens	428
Humes v. O'Bryan	98, 179, 180, 189, 190, 267, 542	Ilse v. Ilse	1363
Humphreys v. Matthews	1084	Inbusch v. Farwell	1334
Humphries v. Chastian	532	Indiana, etc. Co. v. Bates	758
Hunn v. McKee	104	Inglebright v. Hammond	179
Hunnicut v. Summey	767, 845	Ingols v. Plympton	681
Hunt v. Benson	824	Ingraham v. Foster	1068
— v. Chapin	302	Innes v. Lansing	485
— v. Erikson	22	Institution v. Euslin	1298
— v. Gookin	1082	Insurance Co. v. Railroad Co.	23
— v. Hall	510	International Bank v. Jones	681
— v. Morris	1222	Irbey v. Brigham	181
— v. Reilly	1223	Irby v. Graham	1342
— v. Rogers	1243	— v. Vining	514
— v. Semonin	659	Irley v. Graham	1325
— v. Smith	1141	Irvin v. Conklin	105
— v. Stewart	1129, 1132, 1138	— v. Nashville, etc. R'y Co.	22, 23
— v. Thibbetts	1000	Irvine v. Forbes	725, 1533
Hunter v. Aldrich	1124, 1132	Irwin v. Bidwell	63, 836
— v. Martin	771	— v. Williar	267
— v. Pfeiffer	205	Isler v. Baker	531, 1269
— v. Waynick	367	Ives v. Miller	1245
— v. Whitehead	171	Ivey v. Hammock	1321
Huntington v. Lyman	413	Ivy v. Walker	797, 1231, 1233, 1245
— v. Potter	512	Jackson v. Alexander	480, 665
Hupp v. Hupp	682	— v. Bohrmann	623
Hurd v. Haggerty	314	— v. Clymer	1338
Hurlbut v. Post	665	— v. Crapp	951
Hurst v. Hill	526	— v. Geese	1265
Hust v. Clarke	329	— v. Holloway	327
Hutchins v. Bank of Tennessee	547	— v. Lahee	1207, 1208
— v. Childress	272, 275	— v. Litchfield	455
— v. Gilman	321	— v. King	1319, 1321
— v. Hudson	311, 541	— v. Sheldon	485, 1343
— v. Turner	314	— v. Stanford	773
Hutchinson v. Dubois	657, 787, 820, 841, 842,	Jacobs v. McBee	338
— v. Onderdonk	907	Jacquin v. Buisson	486, 1200, 1293
— v. Smith	280, 282, 396, 488, 1300	Jaffe v. Krum	484, 486
Hutton v. Laws	1311	James v. Bostwick	337
Hutzler v. Phillips	1328	— v. Stratton	840
Huwer v. Dannenhoffer	1009	Janney v. Brown	1037
Hyams v. Rogers	268	January v. Poyntz	1348
Hyde v. Easter	1155	Jaques v. Greenwood	1344
Hyer v. Burdett	1093	— v. Marquand	395
— v. Norton	496	Jarman v. Ellis	321
Hyman v. Stadler	454, 1327	Jarvis v. Brooks	759, 771, 1324, 1327
Hynes v. Stewart	1067	— v. Dyer	839
Hyne v. Erwin	378	Jeffreys v. Coleman	335
Hyrschfelder v. Keyser	366, 368	Jeffries v. Castleman	275
Iddings v. Bruen	1146	— v. Laurie	384
— v. Pierson	511	— v. Mutual Life Ins. Co.	326
Ihmsen v. Lathrop	100	Jenison v. Dearing	481
		Jenkins v. Barrows	190

Jenkins v. Davis . . . .	430	Jonau v. Blanchard . . . .	482
— v. Howard . . . .	1222	Jones' Appeal . . . .	764
— v. Peckinpaugh . . . .	913	Jones' Case . . . .	330
Jenness v. Carleton . . . .	1291, 1301	Jones v. Bailey . . . .	277
— v. Smith . . . .	760, 1036, 1307	— v. Bartlett . . . .	969
Jennings v. Chandler . . . .	1201	— v. Blair . . . .	683
— v. Estes . . . .	271	— v. Booth . . . .	414
— v. Rickard . . . .	707	— v. Butler . . . .	943
Jennison v. Walsh . . . .	1245	— v. Call . . . .	23, 174
Jessup v. Carnegie . . . .	6, 8	— v. Caperton . . . .	468
— v. Cook . . . .	915, 1126	— v. Clark . . . .	953, 1539
Jeter v. Penn . . . .	44	— v. Dexter . . . .	706, 1090
Jewell v. Ketchum . . . .	1244	— v. Fegeley . . . .	55
— v. West Orange . . . .	624	— v. Fletcher . . . .	774, 782
Jewett v. Meech . . . .	780, 781	— v. Foster . . . .	550
Jewett, In re . . . .	107, 110	— v. Hardisty . . . .	805
Joacquin v. Buisson . . . .	469	— v. Hurst . . . .	641
Johns v. Brown . . . .	515	— v. Jackson . . . .	228
— v. Rattin . . . .	337	— v. Jones 681, 820, 906, 921, 1113	
Johnson v. Ames . . . .	1340	— v. Lusk . . . .	327, 1333
— v. Barry . . . .	292, 361	— v. McMichael . . . .	33
— v. Berlzheimer . . . .	1299	— v. Neale . . . .	773, 775
— v. Bernheim . . . .	359, 408	— v. O'Farrel . . . .	80
— v. Butler . . . .	1112	— v. Shaw . . . .	1238
— v. Byerly . . . .	370	— v. The State . . . .	741
— v. Byrd . . . .	659	— v. Thompson . . . .	841
— v. Clark . . . .	758, 776	— v. Walker . . . .	1361
— v. Corser . . . .	7	Joplin v. Cordrey . . . .	948
— v. Crichton . . . .	327	Jordan v. Miller 169, 342, 606, 1118,	
— v. Fowler . . . .	21		1197
— v. Gallivan . . . .	189	Jordon, In re . . . .	396
— v. Garrett . . . .	1146	Joseph v. Fisher . . . .	179
— v. Hartshorne . . . .	1293	Joshin v. Stokes . . . .	175
— v. Hersey . . . .	1341	Joyslyn v. Taylor . . . .	808
— v. Kaiser . . . .	803	Judd Linseed Oil Co. v. Hub-	
— v. Kelly . . . .	1242	bell . . . .	454, 467, 661
— v. Lewis . . . .	1534	Judge v. Braswell . . . .	262
— v. Loughery . . . .	713, 740	Judson v. Adams . . . .	38
— v. Mantz . . . .	1209	Julia, The . . . .	154
— v. McDonald . . . .	474	Julian v. Wrightsman . . . .	845, 1326
— v. Miller . . . .	35	Julio v. Ingalls . . . .	47
— v. Robinson . . . .	279	Junek v. Hezeau . . . .	1141
— v. Rogers . . . .	846	Justices v. McLaren . . . .	808
— v. Short . . . .	1084	Kahn v. Smelting Co. . . .	174, 1539
— v. Smith . . . .	631	Kaine's Appeal . . . .	848
— v. Straus . . . .	782	Kaiser v. Fendrick . . . .	297, 502
— v. Totten . . . .	541	Kalbach's Estate . . . .	878
— v. Trask . . . .	358	Kanauth v. Bassett . . . .	790
— v. Wilcox . . . .	240	Kaskaskia Bridge Co. v.	
— v. Wilson . . . .	1241	Shannon . . . .	274
— v. Young . . . .	877	Kasson v. Brocker . . . .	336, 337
Johnson's Appeal . . . .	1328	Kauffman v. Fisher . . . .	616, 645
Johnston v. Bernheim . . . .	256	Kaufman v. Schoeffel . . . .	162, 840
— v. Brown . . . .	240	Kayser v. Maugham . . . .	22, 119, 178
— v. Clements . . . .	189		760, 1085
— v. Donovan . . . .	669	Kean v. Johnson . . . .	1182
— v. Dutton . . . .	305, 411, 725	Kearney v. Fenner . . . .	649
— v. Preer . . . .	1040	Keaton v. Mayo . . . .	932
Johnston's Appeal . . . .	189		

Keck v. Fisher . . . . .	347	Kerr v. Canada Bank of Commerce . . . . .	285
Keese v. Coleman . . . . .	1324	— v. Potter . . . . .	40, 45
Keith v. Armstrong . . . . .	858	— v. Sharp . . . . .	397
— v. Fink . . . . .	578	Kerrick v. Stevens . . . . .	961
— v. Keith . . . . .	1090	Kershaw v. Kelsey . . . . .	154
— v. Pratt . . . . .	808	Kestner v. Sindlinger . . . . .	1345
Kelleher v. Tisdale . . . . .	183	Ketcham v. Clarke . . . . .	510
Keller v. Hicks . . . . .	664	Ketchum v. Durkee . . . . .	832, 833
— v. Stoltzenbach . . . . .	973	— v. Ketchum . . . . .	1084
— v. West . . . . .	496	Ketchum, In re . . . . .	379
Kelley v. Bourne . . . . .	17, 763	Keystone Nat. Bank v. Ran- dle . . . . .	116
— v. Greenleaf . . . . .	710, 950	Kidd v. Brown . . . . .	647
— v. Hurlburt . . . . .	508	Kidder v. McIlhenny . . . . .	1124
Kellogg v. Fancher . . . . .	369	— v. Page . . . . .	1338
— v. Griswold . . . . .	14	Kilbourn v. Latta . . . . .	170, 171, 705
— v. Moore . . . . .	1124, 1128, 1171, 1244	Killam v. Preston . . . . .	1233
— v. Olson . . . . .	773	Killip v. Cattle . . . . .	1232
— v. Totten . . . . .	1005	Kimball v. Gearhart . . . . .	987
Kellogg Bridge Co. v. The United States . . . . .	1555	— v. Hamilton . . . . .	280, 367
Kellogg Newspaper Co. v. Farrell . . . . .	22, 175	— v. Lincoln 710, 895, 902, 1212, 1293, 1311	
Kelly v. Baker . . . . .	280	— v. Seal 1080, 1083, 1142, 1144	
— v. Clancey . . . . .	747	— v. Thompson . . . . .	791
— v. Devlin 184, 205, 213, 1124		— v. Walker . . . . .	906
— v. Eckford . . . . .	1108	Kimberly's Appeal . . . . .	586
— v. Kauffman . . . . .	878	Kimbro v. Bullitt . . . . .	302
— v. Murphy . . . . .	182, 516	Kimmins v. Wilson . . . . .	143, 1064
Kelton v. Leonard . . . . .	288	King, In re . . . . .	487
Keneys v. Richards . . . . .	415	King v. Barber . . . . .	551
Kemp v. Camley . . . . .	280	— v. Barbour . . . . .	156, 189, 633
— v. Coffin . . . . .	532	— v. Bell . . . . .	23
Kendall v. Hackworth . . . . .	778	— v. Faber . . . . .	413
— v. Rider . . . . .	764, 1334	— v. Fraser . . . . .	40, 174
Kendrick v. Campbell . . . . .	537	— v. Hamilton 763, 894, 904	
— v. Cisco . . . . .	174	— v. Leighton . . . . .	1268, 1377
— v. Tarbell . . . . .	441, 1134	— v. Remington . . . . .	351, 759
Kennebeck Co. v. Augusta Ins. etc. Co. . . . .	258	— v. Sarria . . . . .	480
Kennedy v. Anderson . . . . .	1037	— v. Sawin . . . . .	480
— v. Bohannon . . . . .	509	— v. Weeks . . . . .	759
— v. Kennedy . . . . .	1275	— v. Whiton . . . . .	708
— v. McFadon . . . . .	1242, 1245	Kingman v. Spurr . . . . .	871
— v. Nat. Un. Bank . . . . .	788	Kingsbury v. Tharp . . . . .	174
— v. Richey . . . . .	808	Kingsland v. Braisted . . . . .	1546, 1550, 1551
— v. Shilton . . . . .	1124	Kingsley v. Kingsley . . . . .	845
Kenney v. Atwater . . . . .	340, 541	Kinlock v. Hamlin . . . . .	1223
Kenniston v. Avery . . . . .	618	Kinney v. Robinson . . . . .	683, 1085
Kent v. Chapman . . . . .	1086	Kinsler v. McCants . . . . .	803
— v. Mojonier . . . . .	209	Kinsman v. Dallom . . . . .	301
— v. Walker . . . . .	660	Kious v. Day . . . . .	637
— v. Wells . . . . .	659	Kipp v. McChesney . . . . .	1249
Kenton Furnace Co. v. Mc- Alpin . . . . .	259, 558, 1297, 1307	Kirby v. Cannon . . . . .	664
Keough v. Foreman . . . . .	1080, 1124, 1129	— v. Carpenter . . . . .	1323
Kepler v. Erie Savings Bank . . . . .	455, 757	— v. Hewitt . . . . .	527
		— v. Lake Shore & M. S. R. R. Co. . . . .	802
		— v. Ingersoll . . . . .	280, 1197

Kirby v. Taylor . . . . .	571	Lahey v. Kingon . . . . .	644
Kirk v. Hiatt . . . . .	276, 530	Laird v. Ivens . . . . .	514
— v. Hodgson . . . . .	725	Laler v. Jordan . . . . .	289, 290
Kirkman v. Snodgrass . . . . .	541	Lallande v. McRae . . . . .	467
Kirkpatrick v. McElroy 1121, 1207		Lamalere v. Caze . . . . .	1128, 1245
— v. Turnbull . . . . .	287	Lamar v. Hale . . . . .	700, 1538
Kitner v. Whitlock . . . . .	238, 301, 305	Lamb v. Durant . . . . .	278
Kitson v. Hillabold . . . . .	1135	— v. Grover . . . . .	34
Klock v. Beckman . . . . .	274	— v. Salters . . . . .	530
Klotz v. Macready 710, 1297, 1301		— v. Singleton . . . . .	509
Knapp v. Edwards 943, 948, 1142		Lambden v. Sharp . . . . .	333
— v. McBride . . . . .	290, 1291	Lambert v. Griffith 797, 1019, 1132,	
Knight v. Ogden . . . . .	842, 851	1171, 1172	
Knott v. Knott . . . . .	462, 756	Lamiette v. Starr . . . . .	325
— v. Stevens . . . . .	758	Lamkin v. Phillips . . . . .	778
Knowles v. Byrnes . . . . .	808	La Mont v. Fullam . . . . .	176
Knowlton v. Reed . . . . .	1353	Lancaster Bank v. Myley 757, 759	
Knox v. Buffington . . . . .	411	Lance v. Deacon . . . . .	622
— v. Hayes . . . . .	575, 583	Landauer v. Vietor . . . . .	287
— v. Schepler . . . . .	808, 811, 841	Landolfo v. Appleton . . . . .	585
— v. Spreecher . . . . .	520	Lane v. Arnold . . . . .	208
— v. Summers . . . . .	841	— v. Carpenter . . . . .	705
Kockler v. Brown . . . . .	1233	— v. Doty . . . . .	502
Koenig v. Adams . . . . .	1255	— v. Jones . . . . .	826
Koningsberg v. Launitz . . . . .	794	— v. Roche . . . . .	1226
Kountz v. Holthouse . . . . .	497	— v. Thomas . . . . .	204
Kramer v. Arthurs 169, 847, 1532		— v. Tyler . . . . .	511, 764, 1232
Kratzer v. Lyon . . . . .	259	Lanford v. Patton . . . . .	631
Kreis v. Gorton . . . . .	1302, 1312	Lang v. Fiske . . . . .	272
Krigbaum v. Vindquest . . . . .	1273	— v. Oppenheim . . . . .	1245, 1246
Kritzer v. Sweet . . . . .	98	— v. Waring . . . . .	299, 766, 800
Kruger, Re . . . . .	541	Langan v. Hewitt . . . . .	341, 411
Krutz v. Craig . . . . .	1091	Lange v. Kennedy . . . . .	531
Kuehenundt v. Haar . . . . .	1095	Lanier v. McCabe . . . . .	413
Kuhn v. Newman . . . . .	22, 48, 1245,	— v. The Mayor . . . . .	234
	1246	Lannan v. Clavin . . . . .	1113, 1140
— v. Weil . . . . .	378, 641	Lansing v. Gaine . . . . .	531, 536, 545
Kuhne v. Law . . . . .	1327	Larkins v. Rhodes . . . . .	171
Kull v. Thompson . . . . .	278	Lash v. Arnold . . . . .	634
Kutcher v. Williams . . . . .	162, 163	Lass v. Eisleben . . . . .	805
Kyle v. Roberts . . . . .	424	Lassiter v. Jackman . . . . .	895
		Latham v. Simmons . . . . .	851
Lachaise v. Marks . . . . .	472, 473, 479,	Lathrop v. Atwood . . . . .	1022
	485	— v. Page . . . . .	570
Lachomette v. Thomas . . . . .	479	Latting v. Fassman . . . . .	1086
Lackey v. Steere . . . . .	549	Laucks v. Martin . . . . .	575, 584
Lacy v. Hall . . . . .	758	Laudry v. Laundry . . . . .	1235
— v. Le Bruce . . . . .	1252	Lauferty v. Wheeler . . . . .	209
— v. Wilkinson . . . . .	632	Lauffer v. Cavett . . . . .	755
Ladd v. Billings . . . . .	828	Laughlin v. Lorenz . . . . .	1354
— v. Griswold . . . . .	833	Laurence v. Merrifield . . . . .	477
Ladiga Saw-mill Co. v. . . . .		Laverty v. Burr . . . . .	299
Smith . . . . .	455	Lawrence v. Batchellor . . . . .	487
Ladue v. Hart . . . . .	681	— v. Clark . . . . .	1242
Laffan v. Naglee . . . . .	714	— v. Dale . . . . .	267
Lafolys v. Carriere . . . . .	283	— v. Kinzing . . . . .	421
Lafon v. Chinn . . . . .	78	— v. Robinson . . . . .	17, 1255, 1256
Lafond v. Deems . . . . .	120, 1267, 1275,	— v. Taylor . . . . .	318, 320
	1532, 1543	— v. Trustees . . . . .	1320

Lawrence, In re . . . . .	281, 806, 808	Level v. Farris . . . . .	660, 780, 783, 1324
Lawson v. Glass . . . . .	1229	Levi v. Karrick . . . . .	894, 972, 1209
Laylin v. Know . . . . .	881	— v. Lottau . . . . .	288
Layton v. Hastings . . . . .	334, 338, 773	Levick's Appeal . . . . .	356
Lazar v. Pearson . . . . .	1245	Levine v. Michael . . . . .	974
Lazarus v. Long . . . . .	273	Levy v. Cadet . . . . .	616
Lea v. Guice . . . . .	273, 956	— v. Cowan . . . . .	842
Leabo v. Goode . . . . .	246, 585	— v. Ley . . . . .	1333
— v. Renshaw . . . . .	1247	— v. Lock . . . . .	472
Leach v. Cook . . . . .	858	— v. McDowell . . . . .	187
— v. Leach . . . . .	942	— v. Walker . . . . .	1008
— v. Milburn . . . . .	1324	— v. Williams . . . . .	845, 846
Leaf's Appeal . . . . .	765, 768, 1296, 1359	Lewis v. Alexander . . . . .	982, 1359
Learned v. Ayers . . . . .	1245	— v. Allen . . . . .	273
Leatherman v. Hecksher . . . . .	299	— v. Conrad . . . . .	1333
Leavitt v. Peck . . . . .	411	— v. Greider . . . . .	79
Ledden v. Colby . . . . .	808	— v. Harrison . . . . .	827
Lee v. Bullard . . . . .	79, 839	— v. Moffet . . . . .	894
— v. Davis . . . . .	590, 895	— v. Post . . . . .	184, 191
— v. Dolan . . . . .	1304	— v. Tilton . . . . .	1534
— v. Guice . . . . .	56	— v. Wade . . . . .	99
— v. Lashbrooke . . . . .	894, 923	— v. Westover . . . . .	332
— v. Onstott . . . . .	334, 338	Lewishon v. Drew . . . . .	808
— v. Oristoll . . . . .	337	Libby v. Robinson . . . . .	611
— v. Orr . . . . .	631, 632	Liberty Savings Bank v.	
— v. Stowe . . . . .	520, 527	— Campbell . . . . .	367, 369, 1329
— v. Wilkins . . . . .	840	Liddell v. Crain . . . . .	351
Leech v. Harris . . . . .	1549	Lidsinger v. Central Line	
Lefavour v. Yandes . . . . .	276	— Steamers . . . . .	166
Lefever v. Underwood . . . . .	914	Ligare v. Peacock . . . . .	183, 820, 895,
Le Fevre v. Castagnio . . . . .	40, 177	— 921, 1082, 1144, 1154, 1255, 1261	
Lefevre's Appeal . . . . .	764	Liggett's Appeal . . . . .	480, 483
Leffier v. Rice . . . . .	308	Lightner v. Penn. Co. . . . .	1079
Leftwich v. Clinton . . . . .	207	Lill v. Egan . . . . .	444
Leftwich v. Leftwich . . . . .	1174	Lilly v. Kroeson . . . . .	254
Leggett v. Hyde . . . . .	55, 78	Lime Rock Bank v. Phette-	
Le Grand v. Eufala Nat. Bk. . . . .	163	— place . . . . .	759, 771
Leidy v. Messenger . . . . .	1245	Lime Rock, etc. Ins. Co. v.	
Leighton v. Hosner . . . . .	973	— Treat . . . . .	413
Leinkauff v. Munter . . . . .	843	Lincoln v. White . . . . .	763
— v. Frenkle . . . . .	163	Lincoln Savings Bank v.	
Lemon v. Fox . . . . .	446	— Gray . . . . .	854, 1288
Lengle v. Smith . . . . .	73	Lindell v. Lee . . . . .	1250
Lennig v. Lennig . . . . .	517, 895, 1143	Lindley v. Davis . . . . .	767
— v. Penn. Morocco Co. . . . .	470	Lindsay v. Guy . . . . .	181
Lenow v. Fones . . . . .	766, 767, 768	— v. Jaffray . . . . .	629
Leonard v. Leonard . . . . .	1236	Lindsey v. Edmiston . . . . .	56
— v. Martin . . . . .	1145	Lindth v. Crowley . . . . .	256, 312
— v. Wildes . . . . .	533	Lineweaver v. Slagle . . . . .	475, 477, 787
— v. Winslow . . . . .	327	Linford v. Linford . . . . .	1340
Lerch Hardware Co. v. Co-		Lining v. Raymond . . . . .	845
— lumbia Bank . . . . .	289, 481	Lint v. Shultz . . . . .	313
Leroy v. Lowber . . . . .	1260	Lintner v. Millikin . . . . .	52
Le Roy v. Matthewson . . . . .	741	Linton v. Hurley . . . . .	377
Le Roy, Bayard & Co. v.		Lisso v. Navra . . . . .	575
— Johnson . . . . .	262	Littell v. Fitch . . . . .	290
Leslie v. Wiley . . . . .	670	Little v. Clarke . . . . .	541
Lester v. Pollock . . . . .	790	— v. Hamilton . . . . .	428
Lesure v. Norris . . . . .	681	— v. Hazard . . . . .	333

Little v. McPherson	805, 808, 846	Lord v. Baldwin	1340
— v. Snedcor	758, 764	— v. Bernier	624
— v. Stanton	1127	— v. Devendorf	780
Little Grocer Co. v. Johnson	288	— v. Proctor	53
Lippincott v. Shaw Carriage Co.	636	Lothrop v. Wightman	849
Liveright v. Martin	262	Louden v. Ball	1327
Liverpool Navigation Co. v. Agar	6, 1328	Louderback v. Lilly	586
Livingston v. Blanchard	932, 971	Loughery v. Johnson	714
— v. Cox	220, 249	Loury v. Brooks	31
— v. Harvey	629	Love v. Payne	860, 993
— v. Hastie	298	— v. Rhyne	681, 683
— v. Lynch	725, 727, 957, 1532, 1533	Lovejoy v. Bowers	368
— v. Roosevelt	296, 297	— v. Spafford	514, 547
Livingstone v. Pittsburg, etc. R. R. Co.	268	Loveridge v. Larned	575, 1268
— v. Roosevelt	119, 262	Loving v. Paired	1341
Lloyd, In re	590, 1324, 1326	Lovney v. Gillenwaters	914
Lloyd v. Thomas	533	Lowe v. Lowe	768
Loab v. Morton	211	— v. Penny	541
Locke v. Lewis	369, 780	— v. Thompson	966
— v. Stearns	382	Lowenstein, In re	283, 647, 648
Locken's Estate	978	Lower v. Denton	1245
Lockridge v. Wilson	179	Lowery v. Drew	337
Lockwood v. Beckwith	705, 710	Lowman v. Lowman	781, 1327
— v. Carr	598, 1324	Lowry v. Cobb	705
— v. Comstock	531	— v. Stotzer	1549
— v. Doane	30	Lucas v. Atwood	1323
— v. Mitchell	811	— v. Baldwin	633
Lodge v. Wild	210	— v. Bank of Darien	276, 545
Loeb v. Morton	647, 1325	— v. Cole	63
— v. Pierpont	281	— v. Coulter	498
Loeschigk v. Hartfield	1300	— v. Saunders	334, 338
Loesser v. Loesser	1129	Luce v. Hartshorn	943
Logan v. Bond	395	Ludington v. Bell	584, 586, 587
— v. Cragin	467	— v. Taft	1088
— v. Greenlaw	598, 768	Ludlow v. Cooper	119, 169, 754, 765, 1312
— v. McNaugher	1534	Ludlum v. Buckingham	1312
— v. Wells	660	Lumberman's Bk. v. Pratt	533
Logie v. Black	41	Lunt v. Lunt	209, 238
London Ass. Co. v. Drennen	66	— v. Stevens	363, 570
London, etc. Society v. Hagerston Bank	257	Lusk v. Graham	1143
Loney v. Bayly	1211	— v. Smith	531
Long v. Carter	260	Lycoming, etc. Co. v. Bar-ringer	105
— v. Garnett	510, 1244	Lyman v. Lyman	117, 894, 903
— v. Majestre	1089	Lynch v. Bitting	1126
— v. Story	531	— v. Flint	354
Look v. Kenney	773	— v. Thompson	34, 407
Loonis v. Armstrong	895, 1297, 1313	Lyndon v. Gorham	841, 843, 858, 859
— v. Barker	378, 379	Lyon v. Ballentine	663
— v. Hoyt	471, 476, 487	— v. Johnson	544
— v. Marshall	31, 40, 41	— v. Malone	1236
— v. Pearson	531, 642	Lysaght v. Phillips	571
Lorch v. Aultman	1209	Mabbett v. White	279
Lord v. Anderson	1147	Macdonald v. Worthington	952
		Machinists' Bank v. Krum	659
		Machinists', etc. Bk. v. Dean	201



Mack v. Woodruff	679, 828, 829	Marine Co. v. Carver	355
Mackay v. Bloodgood	333	Market Nat. Bk. v. Hofheimer	284
Mackey v. Auer	1233	Markham v. Buckingham	631
Mackintosh v. Tatman	1020	— v. Hazen	499
Macklin v. Crotcher	445	— v. Jones	98
Macy v. Combs	15	Marks v. Hill	790
— v. De Wolf	138, 139	— v. Sigler	202
Maddock v. Astbury	989, 1305	— v. Stein	25
Madison Co. Bk. v. Gould	469, 471, 482	Marlatt v. Scantland	1296
Maffet v. Leuckel	310	Marlett v. Jackman	240, 1291, 1293
Magill v. Merrie	252, 290, 508	Marquand v. N. Y. Mfg. Co.	1268, 1281
Maginn v. Lawrence	474, 475	Marsh v. Davis	168, 170
Maginnis v. Crosby	878	— v. Gold	343
Mahan v. Sherman	1236	— v. Masterson	1083
Maher v. Bull	1140	— v. Mead	454
Mahnke v. Neal	1124, 1128, 1129	— v. Northwestern Ins. Co.	28
Mair v. Beck	644	— v. Thompson Nat'l Bank	296, 341, 342, 356
— v. Canavan	586, 587, 877, 1021	Marshall v. Hull	629
Major v. Hawkes	320	— v. Johnson	722, 1182
Malcomson v. Malcomson	434	Marsh's Appeal	901
Maley v. Brine	945	Marston v. Dewberry	840, 842
Malley v. Atlantic Ins. Co.	345	Marten v. Van Shaack	1008
Mallory v. Russell	766, 767	M'Arthur v. Ladd	35
Maloney v. Bruce	469, 477	Martin v. Davis	608
Maltby v. Northwestern, etc. R. R. Co.	268, 421	— v. Ehbrenfels	181
Manegold v. Grange	73	— v. Evans	780
Manhattan v. Colgate	473	— v. Fewell	6, 510
Manhattan Co. v. Laimbeer	327, 472	— v. Good	254
— v. Ledyard	292	— v. Johnson	236, 623
— v. Phillips	471, 472, 476, 736	— v. Kaffroth	273
Manhattan, etc. Mfg. Co. v. Sears	15, 72, 141, 178	— v. Kelly	6 9
Mann v. Clapp	181, 427, 541, 542	— v. Kirk	523
— v. Etna Ins. Co.	337	— v. Morris	759, 768
— v. Flanagan	895	— v. Searles	545
— v. Higgins	829	— v. Smith	767, 1083, 1207
— v. Locke	537	— v. Solomons	1232
Manning v. Gasharie	457, 1532, 1534	— v. Stubbings	1082
— v. Hayes	291	— v. Tidwell	21
— v. Smith	808	— v. Thrasher	277
— v. Wadsworth	1062	— v. Walton	521, 545
Manuel v. Escolle	1309	— v. Young	611
Manufacturers' Bank v. Winship	295	Martine v. Albro	1108
Manufacturers' & Mechanics' Bank v. Gore	313, 382	Marvin v. Buchanan	427
Manville v. Parks	183, 407, 1538, 1539	— v. McRae	802
Manwaring v. Griffin	351	— v. Trumbull	771
Maples v. Geller	802	Marx v. Bloom	1245
Marble v. Lypes	99, 179	— v. Goodnough	1094
Mardis v. Shackleford	250	— v. Jones	570
Marietta, etc. R. R. Co. v. Mowry	351	Marye v. Jones	1256
		Mason, Ex parte	308
		Mason v. Connell	859, 1069
		— v. Dennison	664
		— v. Eldred	607
		— v. Hackett	40
		— v. Jonett	571

Mason v. Partridge . . .	411	McCall v. Moss . . .	318, 566, 925, 955, 976, 995, 1148, 1280, 1291
— v. Potter . . .	14, 37	— v. Oliver . . .	1232
— v. Rice . . .	858	McCament v. Gray . . .	1089
— v. Slevin . . .	1359	McCandless v. Hadden . . .	802
— v. Tiffany . . .	457, 458, 506	McCarragher v. Gaskell . . .	377
— v. Tipton . . .	1223	McCart v. Lewis . . .	334, 338
— v. Wickersham . . .	585	McCarthy v. Nash . . .	105
Massey v. Pike . . .	338	McCaskell v. Lancashire . . .	769, 770
Masterson v. Botts . . .	1549	McCaskey v. Pollock . . .	631, 647
Mathers v. Patterson . . .	735	McCaughey, In re . . .	381
Matherson v. Wilkinson . . .	805, 1303	McCauley v. Cleveland . . .	38
Mathewson v. Allen . . .	703	— v. Fulton . . .	825
Matlock v. James . . .	759, 771, 1324	— v. Gordon . . .	445
— v. Matlock . . .	757, 771, 797, 824	McChesney v. Kipp . . .	1239
Matney v. Gregg . . .	805, 1314	McClean v. Kennard . . .	62
Matteson v. Nathanson . . .	1295, 1301, 1307	— v. Miller . . .	784
Matthews v. Dare . . .	411	McClellan v. Cumberland Bank . . .	571
— v. Felche . . .	98	McClelland v. Lindsay . . .	198
— v. Hunter . . .	769	— v. Remsen . . .	278, 279, 347
— v. Sniffen . . .	624	McClung v. Copehart . . .	1116, 1117
— v. Steitz . . .	805, 808	McClure v. Hill . . .	258
Matthewson v. Clarke . . .	1094	McConkey v. Rogers . . .	637
Mauck v. Mauck . . .	765, 770	McConnell v. Denver . . .	1539
Maude v. Rodes . . .	1038, 1068	— v. Wilkins . . .	307, 314
Maudlin v. Branch Bank . . .	296, 341, 413, 514, 545	McCoon v. Galbraith . . .	550
Mauney v. Coit . . .	22, 40, 534	McCord v. Scale . . .	210, 632
Maunsell v. Willett . . .	40	— v. Tennille . . .	781
Maupin v. Daniel . . .	1176	McCormick v. Littler . . .	160
Maxey v. Averill . . .	1320	— v. McCormick . . .	829, 925
— v. Strong . . .	518	McCormick's Appeal . . .	762, 1148, 1337
Maxwell v. Clark . . .	1377	McCotter v. McCotter . . .	259
— v. Cochran . . .	1377	McCowin v. Cubbison . . .	519
— v. Day . . .	587	McCoy v. Anderson . . .	234
Mayberry v. Barniton . . .	341	— v. Boley . . .	423
Maybin v. Moorman . . .	778	— v. Brennan . . .	845
Mayer v. Clark . . .	780	McCracken v. Milhous . . .	271, 496, 1079
— v. Garber . . .	781, 797	McCrae v. Robeson . . .	912
— v. Taylor . . .	498	McCrary v. Slaughter . . .	26, 48, 302, 362
Maynard v. Fellows . . .	301	McCulley v. McCulley . . .	759
— v. Ponder . . .	661	McCulloch v. Judd . . .	659
Mayo v. Loyston . . .	162	McCulloh v. Dashiell . . .	1323
Mayor v. Hawkes . . .	526	McCullough v. Sommerville . . .	279, 280, 339
Mayrant v. Marston . . .	22, 31	McDonald v. Beach . . .	1327
McAdams v. Hawes . . .	1282, 1284	— v. Clough . . .	56
McAllister v. Montgomery . . .	766	— v. Eggleston . . .	334
McAndrew v. Walsh . . .	1079	— v. Matney . . .	22, 174, 175
McArthur v. Chase . . .	484, 485	— v. Parker . . .	430
— v. Oliver . . .	278	McDonnell v. Battle House Co. . .	40, 177
McArthur's Estate . . .	1324	McDonough v. Bullock . . .	22, 43
McCart v. Emlen . . .	841	McDougal v. Banks . . .	776
McAvoy's Estate . . .	768	McDuffie v. Bartlett . . .	174, 1344
McBride v. Hogan . . .	334	McElroy v. Ludlam . . .	274
— v. Stradley . . .	895, 896		
McCabe v. Franks . . .	1176		
McCahan v. Gensemer . . .	487		
McCall v. Moschcowitz . . .	181, 189, 190, 200, 1002, 1007, 1083, 1275, 1324		

McElroy v. Melear . . .	519	McLeod v. Ballard . . .	189
McElvey v. Lewis . . .	1255	— v. Lee . . .	270
McEvoy v. Bock . . .	178	McLinden v. Wentworth 313, 314,	496
McFadden v. Hunt . . .	637	McLucas v. Durham . . .	879
McFadden v. Harrington . . .	271	McMahon v. McCleman . . .	707
McFarland v. Crary . . .	250	— v. Rauhr . . .	1548, 1552
— v. Lewis . . .	192	— v. Thornton . . .	632
McFerran v. Filbert . . .	973	McMichael v. Rabul . . .	1176, 1310
McGehee v. Dougherty . . .	1232	McMillan v. Hadley . . .	754, 774
McGill v. Dowdle 22, 24, 291, 305		— v. James . . .	278, 734
— v. McGill . . .	505, 1319	McMullen v. Mackenzie . . .	184
McGilway v. Clement . . .	812	McMurray v. Fletcher . . .	763
McGinnis v. Farrelly . . .	475	McNair v. Platt . . .	330
— v. Flynn . . .	475	— v. Ragland . . .	1122
McGinty v. Flannagan 1298, 1300		— v. Rayland . . .	913
McGlensey v. Cox . . .	861, 979	— v. Rewey 282, 429, 845, 846	
McGovern v. Robertson . . .	53	McNally v. Kerswell . . .	806
McGowan Bros. Pump & Machine Co. v. McGowan 1011		McNamara v. Draft . . .	199, 200
McGown v. Sprague . . .	835	McNaught v. Bostick . . .	611, 806
McGrath v. Sinclair . . .	766	McNaughton's Appeal . . .	645
McGraw v. Dole . . .	1084	McNeill v. Reynolds . . .	198, 260
— v. Pulling . . .	955	McNeish v. Hulless Oat Co. 260,	1294
McGreary v. Chandler 1535, 1536		McNiel v. First Congrega-	
McGregor v. Cleveland 440, 633		— tional Society . . .	769, 774
— v. Ellis . . .	280, 784, 833	McNutt v. King . . .	1263, 1269
McGrew v. Walker . . .	174	— v. Strayhorn . . .	280, 693
McGuire v. Blanton . . .	343	McPeters v. Ray . . .	1138
— v. O'Hallaran . . .	179	McPherson v. Pemberton . . .	224
— v. Ramsey 758, 759, 1039, 1116		— v. Rathbone . . .	189, 531
McGunn v. Hamlin 65, 156, 225,	1132	— v. Robertson . . .	1245
McHale v. Oertel . . .	860, 1245	McQuewans v. Hamlin . . .	341
McIlvaine v. Armfield . . .	126	McRae v. McKenzie . . .	916, 1139
McIntire v. Yates 1324, 1326, 1327		McRobert v. Crane . . .	633
McIntire's Appeal . . .	951	McSherry v. Brooks . . .	1235
McIntosh v. Almon . . .	1330	McStea v. Matthews . . .	110
McKaig v. Hebb . . .	1037, 1087	McVicker v. Ross . . .	1554
McKay v. Joy . . .	1091, 1297	McWhorter v. McMahan . . .	368
— v. Overton . . .	925, 1231	Meachen v. Batchelder . . .	295
McKean v. Vick . . .	1297	Mead v. Raymond . . .	806
McKee v. Griffin . . .	764	— v. Shepard . . .	362
— v. Hamilton 309, 365, 588		— v. Witherow . . .	847
McKelvey's Appeal . . .	1116, 1121	Meador v. Malcolm . . .	297
McKenna's Estate . . .	644, 1324	Meador v. Hughes 21, 498, 501, 825	
McKenzie v. Dickinson . . .	715	Meaher v. Cox . . .	995, 1277
McKeown v. Guild . . .	1115, 1121, 1122	Mears v. James . . .	103
McKinney v. Baker . . .	778	Meason v. Kaine . . .	1058
— v. Brights . . .	327	Mechanics' Bank v. Dakin . . .	317
— v. Rosenband . . .	788	— v. Foster . . .	297
— v. Smith . . .	352	— v. Livingston 299, 543	
McKnight v. McCutchen . . .	1245	Mechanics, etc. Co. v. Rich-	
McKowan v. McGuire . . .	808	— ardson . . .	296
McLain v. Carson . . .	1319	Mechanics' National Bk. v.	
McLaughlin v. Simpson . . .	1089	— Landauer . . .	1206
McLellan v. Detroit File		McCutchen v. Kennady . . .	415
Works . . .	7, 575	Medberry v. Soper . . .	407, 467
— v. Pennell . . .	273	Meech v. Allen . . .	1327
		Meehan v. Valentine . . .	30

Meggett v. Kinney . . . . .	536	Miller v. Andres . . . . .	1236
Melly v. Wood . . . . .	771	— v. Bartlett . . . . .	40
Melane v. Spencer . . . . .	605	— v. Brigham 861, 863, 864, 1280	
Mellinger v. Parsons . . . . .	518, 523	— v. Cappel . . . . .	802
Meltzer v. Doll . . . . .	609	— v. Chambers . . . . .	107
Menagh v. Whitwell 786, 797, 799,		— v. Chandler . . . . .	40
826, 841, 851, 863, 1342, 1345		— v. Coffman . . . . .	1310
Mendenhall v. Bendow . . . . .	1309	— v. Dow . . . . .	332
Mengel's Estate . . . . .	895	— v. Estill . . . . .	833
Mercantile Bank v. Cox . . . . .	437	— v. Harris . . . . .	1116
Mercer v. Sayre . . . . .	536	— v. Hines . . . . .	290, 293, 304
Merchant v. Belding . . . . .	263	— v. His Creditors . . . . .	1325
Merchants' Bank v. Thomp-		— v. House . . . . .	301
son . . . . .	23, 430, 951, 1067, 1068	— v. Hughes . . . . .	21, 287
Merchants', etc. B'k v. Stone . . . . .	8	— v. Jones . . . . .	1091, 1296
Merchants' Nat. B'k v. Ray-		— v. Knauff . . . . .	1251
mond . . . . .	163	— v. Lord . . . . .	926, 1126
Meredith v. Ewing . . . . .	253, 1081,	— v. Manice . . . . .	413
1083, 1245		— v. Marx . . . . .	162, 163, 176
Meridan Nat. Bank v. Brandt . . . . .	825,	— v. Miller . . . . .	1344
831		— v. Northern Bank . . . . .	456
Merriam v. Cunningham . . . . .	158	— v. Price 32, 278, 317, 780, 825	
Merrick v. Brainard . . . . .	860	— v. Procter . . . . .	768
— v. Gordon . . . . .	106	— v. Schneider . . . . .	545
Merrill, In re . . . . .	475	— v. Stone . . . . .	496
Merrill v. Green . . . . .	1021, 1239	— v. Sullivan . . . . .	349
— v. Rinker . . . . .	841	— v. Thorn . . . . .	1252
Meritt v. Pollys . . . . .	510	— v. White . . . . .	1551
Merritt v. Dickey . . . . .	769, 770	Millerd v. Thorn . . . . .	601
— v. Williams . . . . .	544	Miller Nat'l Bank v. Jefferson 1378	
Merriwether v. Hardeman . . . . .	945,	Miller's Appeal . . . . .	896
1130, 1229, 1242, 1245, 1250		Milliken v. Loring . . . . .	526
Mershon v. Hobensack . . . . .	98	Mills v. Barber . . . . .	278, 279
Merwin v. Playford . . . . .	40	— v. Dickson . . . . .	644
Messerve v. Andrews . . . . .	40, 932	— v. Fellows . . . . .	894, 1112
Messer v. Messer . . . . .	757, 1324	— v. Kerr . . . . .	285
Messinger's Appeal . . . . .	642	Milne v. Douglas . . . . .	627
Messner v. Lewis . . . . .	633	Milner v. Cooper . . . . .	1298
Metcalf v. Fouts . . . . .	1017	Milne's Appeal . . . . .	470, 1108
— v. Officer . . . . .	56, 180	Miner v. Downer . . . . .	435
— v. Redman . . . . .	64	— v. Lorman . . . . .	1121, 1246
Metropolitan Bank v. Gruber . . . . .	469,	— v. Pierce . . . . .	850
— v. Sirret . . . . .	472	Minor v. Gaw . . . . .	372
471, 473, 476, 479,		M'Intire v. McLaurin . . . . .	306
481, 484		Mitchell v. Dale . . . . .	665
Mette v. Feldman . . . . .	773, 1025	— v. Darmond . . . . .	468
Meyberg v. Steagall . . . . .	840	— v. Dobson . . . . .	578
Meyer v. Atkins . . . . .	518	— v. Gornley . . . . .	862
— v. Krohn . . . . .	116, 541, 542, 545	— v. Gormully . . . . .	708
Meyers v. Bennet . . . . .	1174	— v. Read . . . . .	713, 714, 1005
Mich. Air Line R'y Co. v.		— v. Rich . . . . .	644
Mellen . . . . .	320	— v. O'Neale . . . . .	144
Mick v. Howard . . . . .	301	— v. Wells . . . . .	1236
Mickle v. Peet . . . . .	1250	Mitchum v. Bank of Ken-	
Miffin v. Smith . . . . .	119, 311, 958	tucky . . . . .	513
Miles v. Ogden . . . . .	558	Mitchusson v. Wadsworth . . . . .	841
— v. Von Deyn . . . . .	661	Mittnacht v. Smith . . . . .	1340
— v. Wann . . . . .	454	Mix v. Muzzy . . . . .	417
Millard v. Ramsdell . . . . .	1306	Moale v. Hollins . . . . .	607

Mode v. Penland . . . . .	376	Mords v. Gleason . . . . .	864
Moderwell v. Mullison . . . . .	765, 776	Moreau v. Edwards . . . . .	368
Modisett v. Lindley . . . . .	333	— v. Saffarans . . . . .	763
Moffat v. McKissick . . . . .	207	Morey v. Grant . . . . .	1203, 1207
Moffatt v. Moffatt . . . . .	1087	Morgan v. Allen . . . . .	77
— v. Thomson . . . . .	1303	— v. Morgan . . . . .	1116, 1308
Moffitt v. Roche . . . . .	261, 1328	— v. Nunns . . . . .	1223
Mohawk, etc. Co. v. Niles . . . . .	106	— v. Olney . . . . .	766
Mohawk Nat. Bk. v. Van Slyck . . . . .	22, 236, 734	— v. Pierce . . . . .	257
Moister's Appeal . . . . .	373	— v. Richardson . . . . .	644
Molen v. Orr . . . . .	528	— v. Roberts . . . . .	550
Moline, etc. Manuf'g Co. v. Webster . . . . .	1323	— v. Schuyler . . . . .	209
Moline Wagon Co. v. Rum- mell . . . . .	327, 510, 542	— v. Skidmore . . . . .	1340
Monohan v. Lloyd . . . . .	642	— v. Stearns . . . . .	27
Monroe v. Conner . . . . .	411	— v. Watmough . . . . .	839
— v. Ezzell . . . . .	625	Morganstern v. Thrift . . . . .	123, 825
— v. Greenhoe . . . . .	23	Moriarity v. Bailey . . . . .	329
— v. Hamilton . . . . .	1085, 1280, 1281, 1282	Morin v. Martin . . . . .	1242
Montague v. Reakert . . . . .	518	Moritz v. Perbles . . . . .	1226
Montanye v. Hatch . . . . .	1108, 1178	— v. Phelps . . . . .	706, 1223
Montgomery v. Boone . . . . .	334	Morlitzer v. Bernard . . . . .	361
Montjoys v. Holden . . . . .	1223	Morrill v. Colehour . . . . .	768
Moody v. Downs . . . . .	283	— v. Merrill . . . . .	327
— v. Payne . . . . .	1343	— v. Spurr . . . . .	1229
— v. Rathburn . . . . .	63, 1269	Morris v. Allen . . . . .	923
Montross v. Byrd . . . . .	585	— v. Hillery . . . . .	637
— v. Mabie . . . . .	711	— v. Jones . . . . .	333
Montz v. Morris . . . . .	681, 683	— v. Litchfield . . . . .	22
Moon v. Story . . . . .	735, 927	— v. Marqueze . . . . .	495, 498
Moore v. Bare . . . . .	819	— v. Morris . . . . .	1334, 1340
— v. Beem . . . . .	632	— v. Neal . . . . .	879
— v. Brink . . . . .	9, 1543, 1551	— v. Peckham . . . . .	169, 1058
— v. Burns . . . . .	630	Morrissey v. Schindler . . . . .	632
— v. Gano . . . . .	1252	Morrison v. Blodgett . . . . .	848, 858
— v. Huntington . . . . .	48, 1039, 1147	— v. Earls . . . . .	1064
— v. Knott . . . . .	1176, 1212	— v. Kurtz . . . . .	1323
— v. Lackman . . . . .	519	— v. Mendenhall . . . . .	347
— v. Peerless Manuf'g Co. . . . .	848	— v. Perry . . . . .	531
— v. Smith . . . . .	14, 36, 43	— v. Smith . . . . .	914
— v. State . . . . .	797	— v. Stockwell . . . . .	1237
— v. Steele . . . . .	825, 1280, 1323	Morrison's Appeal . . . . .	590
— v. Stevens . . . . .	336	Morrissey v. Weed . . . . .	1552
— v. Thieher . . . . .	932	Morrow v. Riley . . . . .	1233
— v. Watts . . . . .	622	Morse v. Bellows . . . . .	334
— v. Wheeler . . . . .	1143	— v. Hagenah . . . . .	288, 307, 308
Moorehead v. Adams . . . . .	788	— v. Hall . . . . .	210
— v. Gilmore . . . . .	292	— v. Richmond . . . . .	30, 257, 258, 260
— v. Wriston . . . . .	495	Morss v. Gleason . . . . .	554, 833
Moorehouse v. Bostwick . . . . .	1332	Mortley v. Flanagan . . . . .	826
Moore's Appeal . . . . .	1320	Morton v. Ostrom . . . . .	758
Moores v. Bates . . . . .	467	Mosely v. Garrett . . . . .	868
Moran v. Le Blanc . . . . .	1235	Moses v. Hatfield . . . . .	632
— v. Prather . . . . .	343	Mosgrove v. Golden . . . . .	629
Morbut v. Moore . . . . .	73	Moss v. Jerome . . . . .	101
Morcein v. Andrews . . . . .	292	— v. McCall . . . . .	920, 923, 1178
		Mosseau v. Thebens . . . . .	501
		Motley v. Jones . . . . .	73
		Mourain v. Dalamre . . . . .	923
		Mowatt v. Howland . . . . .	546, 548

Mowbray v. Lawrence	852, 1343	Napier v. M'Leod . . .	536
Moynahan v. Hanaford	296, 342	Nason, Ex parte . . .	1328
Moyes v. Brumiaux . .	181	National Bank v. Cushing .	1325
Mudd v. Bast . . .	1291	— v. Norton . . .	531, 545
Mudge v. Parker . . .	734	— v. Thomas . . .	431
— v. Treat . . .	549	National Bank of Augusta v.	
Muir v. Leitch . . .	1324	Bones . . .	42
Mulhall v. Gillespie . .	453	National Bank of Common-	
Mullany v. Keenan . . .	1230	wealth v. Law . . .	295, 342
Mulligan v. Entwisle . .	407	National Bank of Jackson-	
Mullendore v. Scott . . .	1023	ville v. Mapes . . .	317, 328
Mumford v. Murray	33, 571, 909	National Bank of Metropolis	
— v. Nicoll . . .	119	v. Sprague . . .	771, 1331
Munro v. Whitman . . .	32	National Bank of Newburgh	
Munroe v. Cooper . . .	297, 413	v. Bigler . . .	773, 1353
Munster v. Cox . . .	624	National Bank of Royalton	
— v. Railton . . .	624	v. Cushing . . .	1328
Murchison v. Warren . .	870	National Bank of Schuyl-	
Murdock v. Martin . . .	1245	ville v. VanDerwerker 1547,	1550
— v. Mehlhop . . .	866	National, etc. Bank v. Lan-	
Murphy v. Abrams . . .	770	don . . .	9
— v. Camden . . .	318	National Security Bank v.	
— v. Crafts . . .	917	McDonald . . .	341
— v. Du Berg . . .	1207	National Shoe and Leather	
— v. Whitlow . . .	354	Bank v. Herz . . .	453
Murray v. Bogart	360, 1242, 1245	National Union Bank v. Lan-	
— v. Elston . . .	1129	don . . .	26, 289, 290, 407
— v. Fox . . .	570	Nave v. Sturges . . .	964
— v. Johnson . . .	63	Naylor v. Sidener . . .	1197
— v. Mumford . . .	1296	Neal v. Hassan . . .	526, 616
Murrell v. Murrell	117, 767, 973,	— v. Wilson . . .	310
	1172	Near v. Lowe	1035, 1116, 1118,
Murrill v. Neill . . .	1324		1124
Murry, In re . . .	1376	Nebraska R. R. Co. v. Colt .	467
Murtagh v. Castello . . .	765	— v. Lett . . .	11
Musier v. Trumpbour . .	32	Nehrbose v. Bliss . . .	802
Musser v. Brink . . .	86, 43	Neil v. Childs . . .	457
Mutual Benefit Ins. Co. v.		— v. Greenleaf . . .	1226
Hildyard . . .	154	Nelles v. Maltby . . .	282, 285
Mutual Nat. Bk. v. Richard-		Nellis' Appeal . . .	951
son . . .	341, 343	Nelson v. Conner . . .	839
Muzzy v. Whitney . . .	44	— v. Hayner . . .	710, 711, 825
Myatts v. Bell . . .	531	— v. Hill . . .	1320
Myers v. Bennett . . .	1143, 1172	— v. Lloyd . . .	189, 662
— v. Callaghan . . .	971	— v. Neeley . . .	301
— v. Huggins . . .	520	— v. Tenney . . .	280, 283, 1300
— v. Kalamazoo Buggy		— v. Tumlin . . .	319
Co. . .	1001, 1009	Neudecker v. Kohlberg	1143, 1144
— v. Moulton . . .	367	Newbiggin v. Pillans . . .	162
— v. Smith . . .	881	Newbrau v. Snieder . . .	58
— v. Winn . . .	436	Newburger v. Friede . . .	22, 1245
Mygatt v. McClure . . .	535	Newby v. Harrell . . .	1221
Mynderse v. Snook . . .	628	Newcome v. Wiggins . . .	164
Myrick v. Dawe . . .	1245	Newcomet v. Brotzman . .	510
		Newell v. Borden . . .	1535
		— v. Desmond . . .	788
Naar v. Naar . . .	1362	— v. Humphrey . . .	740, 1309
Naglee v. Minturn . . .	672, 1256	— v. Smith . . .	287
Nall v. McIntyre . . .	327	Newhall v. Buckingham . .	840
Napier v. Catron . . .	333, 338		

Newland v. Tate . . .	116, 901	Norris v. McCanna . . .	163
Newlin v. Bailey . . .	53, 99	— v. Rogers . . .	931
Newman v. Bagley . . .	283	— v. Vance . . .	158
— v. Bean . . .	34, 848	— v. Vernon . . .	791
— v. Norris . . .	163	North v. Bloss . . .	665
— v. Richardson . . .	289, 292	— v. Mudge . . .	644
New Market Nat. Bank v. Locke . . .	809, 1324	Northern Ins. Co. v. Potter . . .	659
New Orleans v. Gauthreaux . . .	5, 98, 797, 841	North Penn. Coal Co.'s Appeal . . .	424
New York Fire Ins. Co. v. Bennett . . .	294, 411, 416	North River Bank v. Stewart . . .	1323
N. Y. Iron Mine v. Negaunee Bank . . .	9	Northrup v. Phillips . . .	719
N. Y. Life Ins. Co. v. Stat-ham . . .	154	Norton v. Thacher . . .	257, 268
N. Y. Marbled Iron Works v. Smith . . .	1549	Norwalk Nat. Bk. v. Sawyer . . .	313, 759, 774
Niagara Bank v. Lord . . .	749	Norwent v. Hull . . .	40
Nichoff v. Dudley . . .	15	Noyes v. Cushman . . .	73
Nichol v. Stewart . . .	261, 825, 829, 863, 1036	— v. New Haven, etc. R. Co. . .	324
Nicholas Bank v. Savery . . .	293	Nunn v. Lackey . . .	291
Nicholaus v. Thielges . . .	40, 189, 191	Nussbaumer v. Becker . . .	516
Nichols v. Cheairs . . .	421	Nutt v. Hunt . . .	307
— v. English . . .	431	Nutting v. Colt . . .	40
— v. Hughes . . .	260	Oak Ridge Coal Co. v. Rogers . . .	376
— v. James . . .	292	Oakey v. Rabb . . .	1324
— v. Prince . . .	1024	Oakley v. Aspinwall . . .	73, 270
— v. Sober . . .	369	Oates v. Brown . . .	649
— v. White . . .	190, 197, 275	O'Bannon v. Miller . . .	780, 782
Nicholson v. Janeway . . .	1131	— v. Simrall . . .	339
— v. Moog . . .	541, 545	Ober v. Indianapolis, etc. R. Co. . .	802, 803
Nickels v. Mooring . . .	526	O'Brien v. Hanley . . .	1172, 1173
Nicklaus v. Dahn . . .	802	— v. Vantine . . .	274
Nicoll v. Mumford . . .	21, 863, 1324	O'Bryan v. Gibbons . . .	1200
— v. Ogden . . .	765, 1552	O'Callaghan v. Fraser . . .	646
Niday v. Harvey . . .	606	O'Conner v. Stark . . .	1138
Niles v. Williams . . .	1082	Odiorne v. Maxcy . . .	270, 698
Nims v. Bigelow . . .	1232	— v. Woodman . . .	1247
— v. Nims . . .	1083, 1138, 1139	Offutt v. Scott . . .	1302
Nims, In re . . .	1378	Ogden v. Arnot . . .	518, 1037, 1269
Nipper v. Jones . . .	681	— v. Astor . . .	26, 808, 1305, 1306
Niven v. Spickerman . . .	1536	O'Gorman v. Fink . . .	845
Nixdorf v. Smith . . .	578	O'Kane v. Hyde . . .	285, 287
Nixon v. Downey . . .	271	Olcott v. Wing . . .	169, 1215
— v. Nash . . .	840	Olery v. Brown . . .	1547, 1550
Noble v. McClintock . . .	327	Oliphant v. Mathews . . .	437
— v. Metcalf . . .	327, 328	Oliver v. Forester . . .	1292, 1297, 1307, 1308
Noblitt v. Bonaffon . . .	103	— v. Gray . . .	124
Noel v. Bowman . . .	879	— v. Lynn . . .	234
— v. Kinney . . .	163	Olleman v. Reagan . . .	880
Nolan v. Donnelly . . .	280, 281	Olmsted v. Hotailing . . .	366
— v. Lovelock . . .	411	Olson v. Morrison . . .	785
Noonan v. McNab . . .	978	O'Neil v. Lamb . . .	169, 222
— v. Orton . . .	978	O'Neill v. Brown . . .	1245
Norman v. Hudleston . . .	1128	— v. Duff . . .	896
Norment v. Johnson . . .	330	Onondaga Bank v. De Puy . . .	312
Norris v. Howard . . .	999	Ontario Bank v. Hennessy . . .	239

Oppenheimer v. Clemmons . . . . .	55,	Palmer v. Tyler . . . . .	1085
56, 176, 177, 186, 508, 820		Palyart v. Goulding . . . . .	660
Oreilly v. Brady . . . . .	1310	Pannell v. Phillips . . . . .	443
Oram v. Rothermel . . . . .	805	Paradise v. Gerson . . . . .	495, 497
Ormsbee v. Davis . . . . .	279, 280	Parchen v. Anderson . . . . .	30, 99
Orr v. Ferrell . . . . .	281, 285	Pardee v. Markles . . . . .	558, 706, 882
Osbey v. Reiner . . . . .	47	Parish v. Lewis . . . . .	824, 833, 1318
Osborn v. Gheen . . . . .	920, 925	Park v. Simmons . . . . .	1547
— v. McBride . . . . .	756	— v. Wooten . . . . .	508
Osborne v. Barge . . . . .	281, 348	Parker, In re . . . . .	585
— v. Brennan . . . . .	71	Parker v. Bowles . . . . .	765, 772
— v. Stone . . . . .	342	— v. Canfield . . . . .	41, 79, 586
— v. Thompson . . . . .	342	— v. Cousins . . . . .	531
Osburn v. Farr . . . . .	156	— v. Fergus . . . . .	79
Osgood v. Glover . . . . .	290, 293, 407	— v. Gregg . . . . .	625
Osment v. McElrath . . . . .	529, 1155	— v. Jackson . . . . .	662
Ostrom v. Jacobs . . . . .	273	— v. Jonté . . . . .	1175
Oteri v. Oteri . . . . .	948, 1256	— v. Macomber . . . . .	306
Otis v. Sill . . . . .	714, 764	— v. Merritt . . . . .	253, 825, 826
Ottoman Cahvey Co. v. Dane . . . . .	237	— v. Parker . . . . .	825
Over v. Hetherington . . . . .	863, 1172,	Parkhurst v. Kinsman . . . . .	141
1173		— v. Muir . . . . .	1124, 1202
Overholt's Appeal . . . . .	771	Parmalee v. Lawrence . . . . .	571
Overton v. Tozer . . . . .	645	— v. Wiggernhorn . . . . .	498
Owen v. Davis . . . . .	1325	Parmenter v. Kingsley . . . . .	1025
— v. Hetherington . . . . .	865	Parnell v. Robinson . . . . .	722, 1156
Owens v. Collins . . . . .	758, 759	Parshall v. Fisher . . . . .	101
— v. Mackall . . . . .	1352	Parsley v. Ramsey . . . . .	237
Owings v. Low . . . . .	276	Parsons v. Tillman . . . . .	499
— v. Trotter . . . . .	447	Partin v. Leiterloh . . . . .	287
Oxley v. Willis . . . . .	536	Patridge v. Kingsman . . . . .	40
Ozeas v. Johnson . . . . .	1250	— v. Wells . . . . .	715
— v. Tolman . . . . .	1245	Parviance v. McClintle . . . . .	21
Packing & Provision Co. v. . . . .		Patch v. Wheatland . . . . .	347
Casing Co. . . . .	630	Pate v. Bacon . . . . .	629
Page v. Brant . . . . .	541, 547, 665	— v. First Nat'l Bank . . . . .	300
— v. Marshall . . . . .	1134	Paton v. Baker . . . . .	760
— v. Morse . . . . .	156	— v. Wright . . . . .	280
— v. Somers . . . . .	706	Patten v. Cunningham . . . . .	455
— v. Thomas . . . . .	759, 771, 774	— v. Kavanaugh . . . . .	334
— v. Thompson . . . . .	1245	— v. Patten . . . . .	1178
— v. Vankirk . . . . .	1265	Patterson v. Blanchard . . . . .	14, 31
Pahlman v. Graves . . . . .	1326	— v. Brewster . . . . .	424
— v. Taylor . . . . .	262, 342	— v. Camden . . . . .	589
Pahlmian v. Cranes . . . . .	1323	— v. Lilly . . . . .	257
Paige v. Paige . . . . .	759, 764, 767, 771	— v. Martin . . . . .	1127
Paine v. Moore . . . . .	1230, 1231	— v. Seaton . . . . .	351
— v. Thatcher . . . . .	1224	— v. Silliman . . . . .	758, 987
— v. Waterloo Gas Co. . . . .	633	— v. Tidewater Pike Co. . . . .	470,
Painter v. Painter . . . . .	1305	481, 1194	
Palmer v. Dodge . . . . .	526, 531	— v. Ware . . . . .	934
— v. Elliott . . . . .	447	Pattison v. Norris . . . . .	521
— v. Maxwell . . . . .	802	Patton v. Calhoun . . . . .	903
— v. Myers . . . . .	280, 281	Pawsey v. Armstrong . . . . .	50
— v. Pinkham . . . . .	109, 189	Payne v. Freer . . . . .	970
— v. Purdy . . . . .	877	— v. James . . . . .	430
— v. Scott . . . . .	307, 396, 633	— v. Matthews . . . . .	1337
— v. Stevens . . . . .	440	— v. O'Shea . . . . .	681
		— v. Slate . . . . .	530



Payne v. Smith . . . . .	1331	Perry v. Spencer . . . . .	1024
— v. Thompson . . . . .	162	Person v. Carter . . . . .	334, 338
Peabody v. Maguire . . . . .	858	— v. Warren . . . . .	161
Peacey v. Peacey . . . . .	1021	— v. Wilson . . . . .	742, 778
Peacock v. Cumings . . . . .	725	Personette v. Pryme . . . . .	170, 1232
Pearce v. Bruce . . . . .	669	Persse & Brooks Paper W <sup>ks</sup>	
— v. Cooke . . . . .	1325, 1328	v. Willett . . . . .	791
— v. Ham . . . . .	1095	Perth-Amboy Manuf <sup>g</sup> W <sup>ks</sup>	
— v. Pearce . . . . .	1144, 1148	v. Condit . . . . .	808
Pearl v. Pearl . . . . .	825	Peters v. Davis . . . . .	627
Pearpont v. Graham . . . . .	280	— v. Horbach . . . . .	397
Pears v. Barnes . . . . .	469	— v. McWilliams . . . . .	495, 915, 1281
Pearson v. Keedy . . . . .	824, 1318	Peterson v. Poignard . . . . .	1089
— v. Parker . . . . .	622	— v. Roach . . . . .	313
— v. Post . . . . .	258, 431	Petit v. Chevelier . . . . .	1203
Pease v. Cole . . . . .	287	Petriken v. Collier . . . . .	119, 527, 531
— v. Rush . . . . .	792	Petry's Appeal . . . . .	529
Peck v. Fisher . . . . .	1335	Pettee v. Appleton . . . . .	76
— v. Lusk . . . . .	101	— v. Orser . . . . .	280, 281
— v. Schultze . . . . .	841	Pettes v. Bloomer . . . . .	337
Pecher v. Hale . . . . .	532	Pettingill v. Jones . . . . .	1232, 1235
Peckham Iron Co. v. Harper . . . . .	382	Pettis v. Atkins . . . . .	6
Pecot v. Armelin . . . . .	756	Peyton v. Lewis . . . . .	500
Peek v. Schultz . . . . .	853	— v. Stratton . . . . .	326
Peel v. Bryson . . . . .	647	Pfeffer v. Steiner . . . . .	809
Pelzer v. Campbell . . . . .	335	Pfeiffer v. Maltby . . . . .	204, 228
Pendleton v. Wambersie . . . . .	1095	Pfirman v. Henkel . . . . .	469, 472
Penn v. Kearney . . . . .	346	Pfirman v. Koch . . . . .	780
— v. Stone . . . . .	1248	Pfister v. Wade . . . . .	632
— Whitehead . . . . .	156, 163	Phelan v. Hutchinson . . . . .	530, 1144
Penniman v. Jones . . . . .	1035	Phelps v. Brewer . . . . .	643
— v. Munson . . . . .	141	— v. Ellhott . . . . .	805
Pennock v. White . . . . .	1281	— v. McNeely . . . . .	1333
Pennsylvania Bk. v. Furness . . . . .	590	Phelps, In re . . . . .	1378
Penn. Ins. Co. v. Murphy . . . . .	345	Philip v. Turner . . . . .	901
Penny v. Black . . . . .	741	Phillippi v. Phillippi . . . . .	1116
— v. Martin . . . . .	607	Phillips v. Blatchford . . . . .	879, 1533,
Pennypacker v. Leary . . . . .	170, 1212	— v. Bridge . . . . .	1535, 1537
Penrock v. Swayne . . . . .	1252	— v. Cook . . . . .	1323, 1342
People v. Coleman . . . . .	234	— v. Crammond . . . . .	839, 849
— v. Judges of Duchess . . . . .	335	— v. Goldtree . . . . .	715
— v. Lyon . . . . .	381	— v. Lockhart . . . . .	632
— v. Till . . . . .	826	— v. Nash . . . . .	1242
People's Bank v. Shryock . . . . .	840, 843,	— v. Phillips . . . . .	64, 508
851, 859		— v. Purington . . . . .	18
People's Union Bank, In re . . . . .	895,	— v. Reeder . . . . .	138, 270, 275
971		— v. Samuel . . . . .	535, 1147
Pepper v. Thomas . . . . .	759, 766, 767	— v. Trezevant . . . . .	30
Percifull v. Platt . . . . .	754, 763	— v. Turner . . . . .	1200
Perkins v. Fisher . . . . .	1378	— v. Turner . . . . .	894
— v. Perkins . . . . .	1087	Philson v. Bampffield . . . . .	1319
Perman v. Tunno . . . . .	1345	Phoenix Ins. Co. v. Moog . . . . .	802
Perrin v. Keene . . . . .	526	Piatt v. Oliver . . . . .	368, 765, 800, 937
— v. Lepper . . . . .	1079, 1196	Pickels v. McPherson . . . . .	325
Perrine v. Hankinson . . . . .	46	Pickens' Estate . . . . .	895
Perry v. Butt . . . . .	21, 186, 370	Pickerell v. Fisk . . . . .	125
— v. Hale . . . . .	1068	Pierce v. Alsbaugh . . . . .	497
— v. Holloway . . . . .	797	— v. Bryant . . . . .	469, 475
— v. Randolph . . . . .	185, 421	— v. Cameron . . . . .	606

Pierce v. Covert . . . . .	1215	Pond v. Kimball . . . . .	846
— v. Cubberly . . . . .	1113	— v. Starkweather . . . . .	430
— v. Daniels . . . . .	914	Pool v. Delaney . . . . .	1237
— v. Hickenburg . . . . .	330	Poole v. Gist . . . . .	385
— v. Jarnagin . . . . .	372	— v. Hintrager . . . . .	496
— v. Jackson 294, 307, 382, 627		— v. Lewis . . . . .	429
841, 1323, 1342		— v. Seney . . . . .	1325, 1328
— McClellan . . . . .	703, 714, 1116	Pooley v. Whitmore . . . . .	296
— v. Pass . . . . .	327, 330	Pope v. Cole . . . . .	807
— v. Scott . . . . .	43, 895, 948	— v. Hayes . . . . .	1023
— v. Shippee . . . . .	21, 22	— v. Nance . . . . .	554
— v. Tiernan . . . . .	827	— v. Randolph . . . . .	1232
— v. Wilson . . . . .	831	— v. Risley . . . . .	536, 541
Pierson v. Hooker . . . . .	334	— v. Salsman . . . . .	1088
— v. Stienmyer . . . . .	192, 206	Popper v. Schieder . . . . .	1203
Pike v. Bacon . . . . .	337	Porter v. Cresson . . . . .	629
— v. Douglas . . . . .	355	— v. Graves . . . . .	633
— v. Hart . . . . .	1249	— v. Gunnison . . . . .	413
— v. Martindale . . . . .	1036	— v. Kinsey . . . . .	1083
Pilcher's Succession . . . . .	5, 797, 1324	— v. Vance . . . . .	376, 384
Pillsbury v. Pillsbury . . . . .	124	— v. Wheeler . . . . .	1017
Pinckney v. Keyler . . . . .	359	— v. Wilson . . . . .	189, 258
— v. Wallace . . . . .	1298	Portland Bank v. Hyde . . . . .	636
Pine v. Ormsbee . . . . .	1454, 1255	Portsmouth v. Donaldson . . . . .	1086
Pinkerton v. Ross . . . . .	210	Posey v. Bullitt . . . . .	333
Pinschower v. Hanks . . . . .	455, 625	Post v. Kimberly 28, 119, 369	
Pipe v. Bateman . . . . .	1536	Postlewaite v. Howes . . . . .	1320
Piper v. Smith . . . . .	766, 921	Pote v. Philips . . . . .	1245
Pi Pie v. Cuzas . . . . .	1228	Potter v. Dillon . . . . .	287
Pitcher v. Barrows . . . . .	514, 636	— v. Greene . . . . .	197
Pitkin v. Pitkin . . . . .	1321	— v. McCoy . . . . .	337
Pitts v. Waugh . . . . .	265, 764	— v. Moses . . . . .	50, 1291
Pittsburg Melting Co. v. . . . .		— v. Price . . . . .	299
Reese . . . . .	470	— v. Search . . . . .	1549
Place v. Sweetzer . . . . .	840, 841, 852	— v. Strausky . . . . .	238
Plano Mfg. Co. v. Frawley 179, 952		Potts v. Blackwell . . . . .	780, 790
Planter's Bank v. Padgett . . . . .	8	— v. Waugh . . . . .	169
Platt v. Halen . . . . .	626, 688	Powell v. Graves . . . . .	1130, 1236
— v. Platt . . . . .	1108	— v. Hopson . . . . .	1294
Pleasants v. Fant . . . . .	79	— v. Maguire . . . . .	1090
Pleiffer v. Hunt . . . . .	495	— v. Messer . . . . .	413
Pleuffer v. Maltby . . . . .	205	— v. North . . . . .	1294
Ploss v. Thomas . . . . .	841, 842	Powell's Succession . . . . .	1242
Plumer v. Lord . . . . .	77, 163, 164	Powers v. Fletcher . . . . .	662
Plummer v. Frost . . . . .	42	— v. Guardian Ins. Co. . . . .	862
Plunkett v. Dillon . . . . .	58, 119	— v. Powers . . . . .	780
Poillon v. Lawrence . . . . .	1378	Powrie v. Fletcher . . . . .	680
— v. Secor . . . . .	111	Pratt v. Langdon . . . . .	72
Poindexter v. Waddy . . . . .	296	— v. McHatton 206, 530, 906,	
Polk v. Buchanan . . . . .	80	926, 1138, 1142, 1210	
— v. Oliver 541, 542, 545, 546		— v. Page . . . . .	511
Pollard v. Brady . . . . .	208, 209	— v. Underwood . . . . .	1190, 1194
— v. Stanton . . . . .	51	Pray v. Mitchell . . . . .	1247
Pollock v. Williams . . . . .	411	— v. Morse . . . . .	704
Pomeroy v. Benton 948, 949, 1130		Prentice v. Elliott 319, 923, 1118	
— v. Coons . . . . .	299	Prentiss v. Foster . . . . .	295
— v. Sigerson . . . . .	80	— v. Kelley . . . . .	202
Pond v. Clark . . . . .	906, 923, 929	— v. Sinclair . . . . .	541, 545
— v. Cumins . . . . .	40	Preston v. Colby . . . . .	691 1324, 1327

Preston v. Foellinger . . . . .	100	Randall v. Hunter . . . . .	297
Preusser v. Henshaw . . . . .	163, 498	— v. Johnson . . . . .	841
Price v. Alexander . . . . .	40, 337	— v. Morrell . . . . .	1181
— v. Cavins . . . . .	1243	Randell v. Yates . . . . .	178
— v. Drew . . . . .	1245	Randle v. State . . . . .	42
— v. Hicks 755, 759, 767, 1296,	1304	Randolph v. Daly . . . . .	691
— v. Hunt . . . . .	179, 847	— v. Peck . . . . .	521
— v. Mulford . . . . .	399, 614	Randolph B'k v. Armstrong . . . . .	278
— v. Towsey . . . . .	510	Rank v. Grote 754, 759, 761, 766,	767
Priest v. Chouteau 22, 176, 757,	766, 1314, 1324, 1325	Rankin v. Jones . . . . .	780
Prince v. Crawford . . . . .	302	— v. Shephardson . . . . .	498, 500
Princeton, etc. Co. v. Gulick . . . . .	510	Ransom, Re . . . . .	765, 767
Pringle v. Leverich . . . . .	537	Ransom v. Loyless . . . . .	544
Printup v. Turner 334, 455, 763		— v. Van Deventer . . . . .	789
Pritchell v. Pollock . . . . .	310	Ranst v. Hanselt . . . . .	413
Prosser v. Hartley . . . . .	845, 846	Rapid, The . . . . .	153
Providence v. Bullock . . . . .	754	Rapier v. Gulf City Paper Co. . . . .	761
Prudhomme v. Henry . . . . .	536	Ratzer v. Ratzer . . . . .	819
Pruyn v. Black . . . . .	661	Raub v. Smith . . . . .	171
Puckett v. Stokes . . . . .	445	Rawson v. Taylor . . . . .	574, 601
Pugh v. Carrie . . . . .	757	Ray v. Bogart . . . . .	1118
Pulford v. Morton . . . . .	169	— v. Powers . . . . .	1535
Pullen v. Whitfield . . . . .	806	Raymond v. Caine . . . . .	1138, 1139
Purdy v. Lacock . . . . .	1337	— v. Putnam . . . . .	1147
— v. Powers . . . . .	327	— v. Vaughn . . . . .	1269
Purington v. Ins. Co. . . . .	258	Rayne v. Terrell . . . . .	470
Pursley v. Ramsey . . . . .	181, 545	Read v. McLanahan . . . . .	839
Purviance v. Sutherland . . . . .	339	— v. Nevitt . . . . .	980
Purvines v. Champion 1233, 1245		Reber v. Columbus, etc. Co. . . . .	666
Pusey v. Dusenbury . . . . .	484	Reboul v. Chalker . . . . .	64
Putnam v. Parker . . . . .	808	Record v. Record . . . . .	644
— v. Robbins . . . . .	774	Reddington v. Lanahan . . . . .	40
— v. Wheeler . . . . .	632	Redfield v. Widdleton . . . . .	1068
Quackenbush v. Sawyer 116, 123,	129	Redheffer v. Leathe . . . . .	1292
Quincey v. White . . . . .	199	Reding v. Anderson . . . . .	1535
Quine v. Quine . . . . .	820	Redlon v. Churchill . . . . .	298
Quiner v. Marblehead Ins. Co. . . . .	278	Reece v. Hoyt . . . . .	527
Quinlivan v. English . . . . .	1181, 1211, 1212	Reed v. Girty . . . . .	609
Quinn v. Myles . . . . .	211	— v. Johnson . . . . .	635
Rabitte v. Orr . . . . .	163, 179	— v. Kremer . . . . .	99, 100, 189
Raborg v. Bank of Columbia . . . . .	808	— v. McConnell . . . . .	1218
Radcliffe v. Varner 360, 371, 411		— v. Murphy . . . . .	40
Raigul's Appeal . . . . .	827	— v. Orton . . . . .	1025
Railroad Co. v. Bixby . . . . .	1325, 1327	— v. Shephardson . . . . .	1342
Railsback v. Lovejoy . . . . .	759	— v. Wessel . . . . .	703
Rainey v. Nance . . . . .	1323, 1334	Reese v. Bradford . . . . .	780, 862
Ralph v. Lockwood . . . . .	210, 630	— v. Kinkead . . . . .	808, 829
Ralston v. Moore . . . . .	806	Reeves v. Ayers . . . . .	775, 780, 786
Ramey v. McBride . . . . .	370	Register v. Dodge . . . . .	502
Rammelsburg v. Mitchell 759, 766,	808, 1011	Rehill v. McTague 925, 1128, 1173	
Ramsay v. Deas . . . . .	401	Reid v. Godwin . . . . .	347
		— v. McQuesten . . . . .	1140
		— v. Smith . . . . .	257, 355, 367
		— v. Vidal . . . . .	1058
		Reilly v. Reilly . . . . .	1233
		— v. Smith . . . . .	541
		Reimsdyk v. Kane . . . . .	443
		Reinheimer v. Hemingway . . . . .	849

Reis v. Hellman . . . .	915	Richardson v. Thacker . . .	£58
Reiter v. Morton . . . .	963	— v. Wyatt . . . .	1172
Remick v. Ewing . . . .	1291, 1293	Richie v. Levy . . . .	905
Remington v. Allen . . . .	1223	Richler v. Poppenhausen . .	802, 807, 1352
— v. Cummings . . . .	644	Richmond v. Judy . . . .	120, 121
Remson v. Pomeroy . . . .	802	Rick v. Neitzy . . . .	948
Rencher v. Anderson . . . .	1122	Ricker v. Adams . . . .	586
Renfrow v. Pearce . . . .	400, 1216	— v. American Loan & Trust Co. . . .	8
Reno v. Crane . . . .	748	Riddle v. Etting . . . .	526
Renton v. Chaplain . . . .	851, 852, 854, 1200	Ridenour v. Mayo . . . .	6, 174
Reppert v. Colvin . . . .	616	Rider v. Gilbert . . . .	820, 1324, 1344
Reubin v. Cohen . . . .	355	Ridge v. Alter . . . .	649
Reynold v. Dodd . . . .	181, 894, 927	Ridgely v. Cary . . . .	1337
Reynolds v. Austin . . . .	1206	— v. Dobson . . . .	121
— v. Cleveland . . . .	119, 429	Ridgway v. Grant . . . .	1227, 1232
— v. Hicks . . . .	116	Ridgway's Appeal . . . .	764
— v. Mardis . . . .	922	Rieser, In re . . . .	1324
— v. Patrick . . . .	1232	Riggs v. Stewart . . . .	1245
— v. Pool . . . .	30	Rimel v. Hayes . . . .	99, 189, 260
— v. Waller . . . .	382	Riner v. Tousle . . . .	1178
Rhea v. Vannoy . . . .	726	Ringo v. Wing . . . .	496, 740
Rhiner v. Sweet . . . .	1139	Riper v. Poppenhausen . . .	472
Rhodes v. McKean . . . .	328	Ripley v. Colby . . . .	119, 195
— v. Williams . . . .	1039, 1210	— v. Savings Bank . . . .	859
Rhodius v. Storey . . . .	258, 647	Rippey v. Evans . . . .	176
Rhyne v. Love . . . .	1124	Rittenhouse v. Leigh . . . .	163
Riari v. Wilhelm . . . .	1245	Ritter v. Galitzenstein . . .	974
Rice v. Austin . . . .	34, 1324, 1242	Rizer v. James . . . .	98, 180
— v. Barnard . . . .	1330	Roach v. Brannon . . . .	1300, 1310
— v. Barrett . . . .	98	Roache v. Pendergast . . . .	1261
— v. Doniphan . . . .	647	— v. Perry . . . .	819, 894
— v. McMartin . . . .	755	Roakes v. Bailey . . . .	562
— v. Pennypacker . . . .	616, 740, 754, 759, 766, 825	Robb v. Mudge . . . .	511, 780
— v. Richards . . . .	805	— v. Stevens . . . .	1330
— v. Shuman . . . .	742	Robbins v. Butler . . . .	1532, 1534
— v. Wolff . . . .	574	— v. Fuller . . . .	526
Rich v. Davis . . . .	296	— v. Laswell . . . .	955
Richard v. Allen . . . .	841	— v. Warde . . . .	181
Richard's Estate . . . .	820, 821	— v. Wells . . . .	1550
Richards v. Baurman . . . .	1195, 1266	Roberts' Appeal . . . .	858
— v. Butler . . . .	253, 510	Roberts v. Eldred . . . .	757, 949, 1150
— v. Fisher . . . .	515	— v. Fitler . . . .	1242, 1247
— v. Grinnell . . . .	31, 170, 1117	— v. Johnson . . . .	376, 380
— v. Hunt . . . .	253, 510, 523	— v. Kelsey . . . .	1090, 1291
— v. Todd . . . .	1067	— v. Law . . . .	1303
Richardson v. Adler . . . .	184	— v. McCarty . . . .	758
— v. Case . . . .	176, 455	— v. McKee . . . .	1182
— v. Farmer . . . .	265	— v. Oldham . . . .	1348
— v. French . . . .	311	— v. Pepple . . . .	296, 327, 445, 659, 1326
— v. Fuller . . . .	645	— v. Ripley . . . .	1249
— v. Hogg . . . .	469, 475	— v. Shepard . . . .	280
— v. Hughitt . . . .	40, 53	— v. Strang . . . .	572
— v. Lester . . . .	347	— v. Totten . . . .	368, 913
— v. Moies . . . .	531	Robertshaw v. Hanway . . .	669, 767, 800, 808, 845
— v. Pitts . . . .	6, 1535	Robertson v. Baker . . . .	755, 833, 835
— v. Smith . . . .	629		
— v. Snider . . . .	546		

Robertson v. Corsett . . .	765	Rosenstiel v. Gray . . .	798, 860, 863,
— v. Jones . . .	313		1037, 1138
— v. Miller . . .	958, 964	Rosenwald v. Hammerstein . . .	622
Robie v. Briggs . . .	556	Rosenzweig v. Thompson . . .	1093
Robinson v. Aldridge . . .	413	Ross v. Cornell . . .	1233, 1245
— v. Bullock . . .	36, 1223, 1245	— v. Everett . . .	649
— v. Crowder . . .	280	— v. Henderson . . .	328, 755
— v. Davidson . . .	1062	— v. Howell . . .	644
— v. Gilfillian . . .	748	— v. Titsworth . . .	1187
— v. Goings . . .	379	— v. Vest . . .	1227
— v. Green . . .	175, 178, 1224,	— v. Whitefield . . .	352
	1245	— v. Wigg . . .	209
— v. Gregory . . .	280	Roth v. Colvin . . .	296
— v. Magarity . . .	238	— v. Kirchoff . . .	175, 189
— v. McIntosh . . .	280, 478	— v. Moore . . .	429
— v. Simmons . . .	820, 1154, 1363	Rothell v. Grimes . . .	780
— v. Taylor . . .	531	Rothwell v. Dewees . . .	669
— v. Thompson . . .	802, 805	Rouillier v. Wernicki . . .	162
— v. Warden . . .	515	Roulston v. Washington . . .	1209
— v. Williams . . .	1232	Routen v. Bostwick . . .	1172
Robison v. The State . . .	381	Rowand v. Fraser . . .	778
Rochester v. Trotter . . .	262	Rowell v. Fuller . . .	319
Rockafellow v. Miller . . .	116	Rowland v. Long . . .	72
Rockwell v. Wilder . . .	1237	— v. Miller . . .	1144
Rodes v. Rodes . . .	906	Rowley v. Stoddard . . .	570
Rodriguez v. Heffernan . . .	863	Roys v. Vilas . . .	1298
Rogers v. Aydelotte . . .	382	Royster v. Johnson . . .	903, 1148
— v. Batchelor . . .	327, 369	Rubber Company v. Good-	
— v. Bradford . . .	847	year . . .	971
— v. Kichline . . .	625	Ruckman v. Decker . . .	741
— v. Moranda . . .	1326	Ruddick v. Otis . . .	37
— v. Nichols . . .	102, 1281, 1343	Rude v. Harvey . . .	291
— v. Rogers . . .	636, 1252	Ruffner v. Hewett . . .	526, 628
— v. Suttle . . .	189	— v. McConnell . . .	336
— v. Taintor . . .	210	Rugely v. Gill . . .	624
Rolfe v. Dudley . . .	378	Ruhe v. Burnell . . .	182
Rollins v. Stevens . . .	341	Rumery v. McCulloch . . .	281, 335
Rolston v. Click . . .	341	Rush v. Thompson . . .	191, 681
Romero v. Dalton . . .	42	Rushing v. Peoples . . .	116
Roney v. Buckland . . .	312, 378	Rusk v. Gray . . .	589
Roop v. Herron . . .	1324, 1332	Russell v. Annable . . .	336
— v. Rogers . . .	1344	— v. Byron . . .	1088
Roosevelt v. McDowell . . .	802	— v. Green . . .	325, 925
Root v. Gay . . .	747	— v. Grimes . . .	1240
Roots v. Salt Co. . .	518, 895	— v. Leland . . .	279, 1281
— v. Wellford . . .	528	— v. Lennon . . .	845
Ropes v. Colgate . . .	473, 476, 477	— v. McCord . . .	862
— v. Upton . . .	999	— v. Miller . . .	755
Rorke v. Russell . . .	1549	— v. Minnesota Outfit . . .	1245,
Rose v. Baker . . .	310		1248, 1249
— v. Coffield . . .	519, 541	— v. Stroud . . .	280, 1300
— v. Gunn . . .	780, 782, 783, 806,	— v. Swann . . .	668
	1301, 1318	— v. White . . .	1084
— v. Keystone Shoe Co. . .	646	Rust v. Chisolm . . .	776, 1310
— v. Roberts . . .	1020	— v. Hanselt . . .	325, 354
Rosenbaum v. Hayden . . .	6, 237, 647	— v. Lowry . . .	1324
Rosenberg v. Block . . .	683	Rutledge v. Squires . . .	413
Rosenfield v. Haight . . .	53	Rutter v. Sullivan . . .	629
Rosenkrans v. Barber . . .	381	Ryan v. Hardy . . .	208

Ryder v. Wilcox . . . . .	45	Scannel v. Taylor . . . . .	541, 589
Ryerson v. Hendrie . . . . .	659, 662	Schackelford v. Clark . . . . .	1328
Ryhiner v. Feickert 100, 123, 186,	237, 446	Schaeffer v. Fithian . . . . .	1327
		— v. Fowler . . . . .	124
Sage v. Chollar . . . . .	778, 824	Schalck v. Harmon . . . . .	797
— v. Woodin . . . . .	1311	Schalter v. Winpenny . . . . .	515
Sager v. Tupper 73, 179, 185, 192,	453, 681	Scharringhausen v. Luebsen . . . . .	811
Sailors v. Nixon-Jones Pub-		Schatzill v. Bolton . . . . .	844
lishing Co. . . . .	22	Schenck v. Long . . . . .	849
Sale v. Dishman . . . . .	1319	Schenke v. Dana . . . . .	903
Salisbury v. Ellison . . . . .	282	Schermerhorn v. Schmer-	
Salmon v. Davis . . . . .	319	horn . . . . .	341
Saloy v. Albrecht 824, 835, 1280		Schieffelin v. Stevens . . . . .	541
Salter v. Krueger . . . . .	663	Schiele v. Healy . . . . .	283
— v. Ham . . . . .	15, 1087	Schindler v. Euell . . . . .	592
Saltmarsh v. Bower . . . . .	259, 309	Schlater v. Winpenny . . . . .	240
Saltsman v. Shults . . . . .	1551	Schley v. Hale . . . . .	841
Sanborn v. Dwinell . . . . .	633	Schmertz v. Shreeves . . . . .	339
— v. Stark . . . . .	519	Schmidlapp v. Currie . . . . .	780, 786,
Sanders v. Pepoon . . . . .	423		1330
— v. Ruddle . . . . .	350	Schmidt v. Foucher . . . . .	319
— v. Scott . . . . .	926	— v. Gunther . . . . .	1548, 1551
— v. Ward . . . . .	320	Schneider v. Sansom . . . . .	366
Sanderson v. Milton Stage Co. 1258		Scholefield v. Eichelberger . . . . .	154,
— v. Sanderson 719, 926, 1142,	1309		1291
Sandy v. Randall . . . . .	1118	Schollenberger v. Seldon-	
Sanford v. Mickles . . . . .	532	ridge . . . . .	119
Sanger v. Ker . . . . .	327, 647	Schoneman v. Fegley . . . . .	534
Sangston v. Hack 40, 879, 895, 948,	958	Schoverling v. Kovar . . . . .	781
San Jose Indiana, The . . . . .	154	Schreiber v. Sharpless . . . . .	381
Sankey v. Columbus Iron		Schuchardt, In re . . . . .	401
Works . . . . .	14, 40	Schulte v. Anderson . . . . .	1144
Sanquoit's Appeal . . . . .	189, 1328	Schulten v. Lord . . . . .	487
Santa Clara Mining Ass'n v.		Schurten v. Davis . . . . .	510
Quicksilver Mining Co. 754, 1538		Schwabacker v. Riddle 377, 401	
Sargent v. Collins . . . . .	183, 434	Schwartz v. Soutter . . . . .	482
— v. Downey . . . . .	39, 126	Schwindler v. Euell . . . . .	575
Satterthwait v. Marshall . . . . .	1058	Scott v. Bandy . . . . .	260
Sauffey v. Howard . . . . .	263	— v. Blood . . . . .	179
Saul v. Kruger . . . . .	623	— v. Bogart . . . . .	647
Saunders v. Bartlett . . . . .	840	— v. Bryan . . . . .	668, 878
— v. Bentley . . . . .	648	— v. Buffom . . . . .	1303
— v. Duval . . . . .	1173, 1175	— v. Campbell . . . . .	24, 1228
— v. Reilly . . . . .	692, 780, 1230	— v. Caruth . . . . .	1245
— v. Wilder . . . . .	802	— v. Colmesnil 21, 444, 508, 607	
Sauntry v. Dunlap 169, 327, 869		— v. Dansby . . . . .	347, 1325
Sauthoff, In re . . . . .	780, 828, 846	— v. Green . . . . .	636
Savage v. Carter . . . . .	828, 904	— v. Haynes . . . . .	382
— v. Putnam . . . . .	881	— v. Kenan . . . . .	780, 825, 845
Savery v. Thurston . . . . .	911	— v. Lalor . . . . .	1139
Sawyer v. N. Y. St. Cloth-		— v. McKinney . . . . .	742
ing Co. . . . .	633	— v. Portinnek . . . . .	1141
— v. Templar . . . . .	98	— v. Reed . . . . .	381
Saylor v. Mockbie . . . . .	370, 1190	— v. Scott . . . . .	1039
Sayre v. Peck . . . . .	1128	— v. Searles . . . . .	1099
		— v. Shepherd . . . . .	359, 531
		— v. Trent . . . . .	319
		— v. Tupper . . . . .	1300
		— v. Webster . . . . .	605

Scott's Appeal . . . . .	882	Shafer v. Randolph . . . . .	98
Scovill v. Kinsley . . . . .	871	Shafer's Appeal . . . . .	499, 754, 756
Scoville Mfg. Co. v. Lindsey . . . . .	310	Shaffer v. Snyder . . . . .	515
Scranton v. Rentfrow . . . . .	185	Shale v. Schantz . . . . .	805
Scroggs v. Cunningham . . . . .	253, 926	Shaler v. Trowbridge . . . . .	400
Scruggs v. Blair . . . . .	765, 768, 769, 858	Shalter v. Caldwell . . . . .	1245
— v. Burruss . . . . .	348, 692	Shamburg v. Abbott . . . . .	877, 1244
— v. Russell . . . . .	171, 705	— v. Ruggles . . . . .	541
Scudder v. Ames . . . . .	895, 955	Shanks v. Klein . . . . .	759, 765, 769
— v. Delashmut . . . . .	1343	Shannon v. Wight . . . . .	1194
Scull's Appeal . . . . .	189, 1328	Shapard v. Lightfoot . . . . .	648
Scully's Appeal . . . . .	190, 271	Sharb v. Beaudry . . . . .	167
Seaman v. Ascherman . . . . .	258	Sharman v. Quier . . . . .	1245
— v. Johnson . . . . .	1230, 1231	Sharp v. Hibbins . . . . .	827, 1081, 1083
— v. Waddington . . . . .	1284	— v. Hutchinson . . . . .	487
Seaton v. Brooking . . . . .	859	Sharpe v. Johnston . . . . .	252
— v. Merchants' Bank . . . . .	681	Shattuck v. Lawson . . . . .	1243
Seavey v. Jenkins . . . . .	1208	Shaw v. Gandolfo . . . . .	28
Seawell v. Payne . . . . .	1069	— v. Knowles . . . . .	1320
Second National Bank v. Farr . . . . .	258, 370	— v. McDonald . . . . .	370
— v. Willing . . . . .	281	— v. McGregory . . . . .	501
Secor v. Keller . . . . .	635	— v. Pratt . . . . .	570
Sedan v. Williams . . . . .	607, 834	Shea v. Donahue . . . . .	736
Seekell v. Fletcher . . . . .	174, 445	Shearer v. Francis . . . . .	1138
Seeley v. Albrecht . . . . .	127	— v. Paine . . . . .	1092
— v. Michell . . . . .	774	— v. Shearer . . . . .	1215
— v. Schenck . . . . .	628	Shearman v. Hart . . . . .	999
Seelye v. Taylor . . . . .	1245	Shed v. Bank . . . . .	644
Seibert v. Bakewell . . . . .	478	— v. Pierce . . . . .	571
Seighortner v. Weissenborn . . . . .	1250, 1265, 1267, 1276	Shedd v. Bank of Brattleboro' . . . . .	1335
Seiler v. Brenner . . . . .	740	— v. Wilson . . . . .	1335
Seitz v. Buffum . . . . .	629	Sheehy v. Graves . . . . .	691
Selden v. Bank of Commerce . . . . .	341, 408	Sheldon v. Smith . . . . .	281
— v. Hall . . . . .	470, 474, 475	Shellito v. Sampson . . . . .	271, 318
Seldner v. Mount Jackson Nat. Bk. . . . .	534	Shelly v. Hiatt . . . . .	902
Seligmann v. Heller Bros. Clothing Co. . . . .	684	Shelmire's Appeal . . . . .	1121
Sellers v. Streater . . . . .	682	Shelton v. Cocke . . . . .	537
Sellew v. Chrisfield . . . . .	791	— v. Knight . . . . .	895
Sells v. Hubbell . . . . .	880	Shenk's Appeal . . . . .	579
Simple v. Flynn . . . . .	1203	Shennefield v. Dutton . . . . .	1236
Sequin's Appeal . . . . .	400	Shepard, In re . . . . .	1281
Serviss v. McDonnell . . . . .	496	Shepard v. Pratt . . . . .	40
Setzer v. Beale . . . . .	3, 253	— v. Ward . . . . .	623
Sewell v. Cooper . . . . .	1245	Shepherd, Ex parte . . . . .	825
— v. Humphrey . . . . .	1090	Sheppard v. Boggs . . . . .	1007, 1085
Sexton v. Lamb . . . . .	734	Sherburne v. Morse . . . . .	760
— v. Sexton . . . . .	701	Sheridan v. Medara . . . . .	73
Seymour v. Butler . . . . .	571	Sherman v. Kruel . . . . .	807
— v. Western Railroad Co. . . . .	654	Sherrill, etc. Engine Co. v. Harwood . . . . .	781
Shaaber v. Bushong . . . . .	343	Sherrod v. Langdon . . . . .	98
Shackleford v. Shackleford . . . . .	780, 782, 834, 1174, 1202, 1330	Sherry v. Gilmore . . . . .	763
— v. Smith . . . . .	112	Sherwood v. Marwick . . . . .	382
Shad v. Fuller . . . . .	1181	— v. St. Paul, etc. R. R. Co. . . . .	764
		— v. Snow . . . . .	313
		Shiddell v. Messick . . . . .	1154
		Shields v. Fuller . . . . .	804, 1250

Shimer v. Huber . . .	826	Skannel v. Taylor . . .	541, 589
Shinn v. Macpherson . . .	787	Skidmore v. Collier . . .	809
Shipe's Appeal . . .	808, 1313	Skinner v. Bedell . . .	802
Shipman v. Lansing . . .	683	— v. Dayton . . .	1532, 1534, 1536
Shirk v. Shultz . . .	156	— v. Shannon . . .	845
Shirley v. Fearnce . . .	337	— v. Tucker . . .	1255
Shoemaker v. Smith . . .	1267	Skipwith v. Lea . . .	808
Shoemaker Piano Co. v. Bernard . . .	499, 502, 1173	Slack v. Parker . . .	101
Short v. McGruder . . .	846	Slade v. Paschal . . .	53, 98
— v. Stevenson . . .	723	Slater v. Arnett . . .	948
Shorter v. Hightower . . .	502	Slatter v. Carroll . . .	1320
Shotwell v. Miller . . .	570	Slaughter v. Doe . . .	754, 763
Shriver v. McCloud . . .	175, 205	Slee v. Bloom . . .	468
Shriver's Appeal . . .	895	Slemmer's Appeal . . .	762
Shropshire v. Russell . . .	710	Sloan v. Moore . . .	279
— v. Shepherd . . .	40	— v. The Owens, etc. Mch. Co. . . .	423
Shurlds v. Tilson . . .	545	Slobig's Appeal . . .	1181
Sibley v. Young . . .	334	Slocum v. Hooker . . .	664
Siegel v. Chidsey . . .	313, 1267	Sloo v. State Bank . . .	644
Siegfried v. Ludwig . . .	529	Slutts v. Chaffee . . .	622
Sigler v. Knox Co. Bank . . .	780	Smith v. Andrews . . .	348
Sigourney v. Munn . . .	757, 774, 1209, 1210	— v. Argall . . .	469
Sikes v. Work . . .	124, 1235	— v. Bailey . . .	162, 164
Silby v. McCullough . . .	99	— v. Baker . . .	1324, 1342
Silver v. St. L., Iron Mt. & T. R'y Co. . . .	1124, 1128	— v. Black . . .	607
— v. Silver . . .	310	— v. Blatchford . . .	634
Silverman v. Chase . . .	289, 457, 458	— v. Bodine . . .	40, 44
Silvers v. Foster . . .	661	— v. Burnham . . .	169
Silveus v. Porter . . .	163	— v. Canfield . . .	629
Simmons v. Curtis . . .	1281	— v. Collins . . .	189, 191
— v. Murray . . .	1231, 1245	— v. Cooper . . .	998
Simonds v. Pierce . . .	499	— v. Danvers . . .	762
— v. Strong . . .	545	— v. Dennison . . .	257, 282
Simonton v. Boucher . . .	537	— v. Edwards . . .	833
— v. McLain . . .	165, 1086	— v. Emerson . . .	849
— v. Sibley . . .	742	— v. Evans . . .	797, 799
Simpson v. Feltz . . .	50	— v. Everett . . .	1067
— v. Geddes . . .	537	— v. Garth . . .	53
— v. King . . .	644	— v. Green . . .	1326
— v. Leach . . .	767, 797, 798	— v. Gregg . . .	631, 632
— v. Schulte . . .	454, 806	— v. Griffith . . .	179
Simrall v. O'Bannons . . .	306	— v. Hall . . .	103, 350, 351
Sims v. McLure . . .	161	— v. Harris . . .	740, 845
— v. Smith . . .	330, 536	— v. Hazleton . . .	931
Sinclair v. Galland . . .	578	— v. Hill . . .	103, 220, 550, 697
— v. Wood . . .	179	— v. Hoffman . . .	430
Singer v. Kelly . . .	482, 485	— v. Hollister . . .	174
Singer Mfg. Co. v. Wood . . .	683	— v. Hood . . .	490
Singiser's Appeal . . .	1250	— v. Howard . . .	784
Sinklear v. Lambert . . .	429, 430	— v. Hulett . . .	189
Sinsheimer v. Tobias . . .	1023	— v. Jackman . . .	542
Sipfle v. Isham . . .	288	— v. Jackson . . .	754, 757
Sitler v. Walker . . .	840, 853	— v. Jones . . .	169, 759, 1324
Sitzer v. Beale . . .	175	— v. Kerr . . .	337
— v. Walker . . .	116	— v. Knight . . .	80
Sizer v. Ray . . .	877	— v. Loring . . .	914
		— v. Lowe . . .	1200
		— v. Ludlow . . .	616



Smith v. Lusher . . . . .	298	Southern Steam Packet Co.	
— v. Mallory . . . . .	1323	— v. McGrath . . . . .	9
— v. McMicken . . . . .	844	Southern White Lead Co. v.	
— v. Moynihan . . . . .	18	Haas . . . . .	64, 191, 1255
— v. Mulock . . . . .	1258	Southmayd v. Southmayd . .	170
— v. Perry . . . . .	40	Southmayd's Appeal . . . .	175, 181, 952
— v. Peters . . . . .	592	Southwick v. Allen . . . .	1261
— v. Ramsey . . . . .	715	— v. McGovern . . . . .	179, 509
— v. Riddell . . . . .	1024, 1224, 1239	Southworth v. Thompson . .	36
— v. Shelden . . . . .	518	Spalding v. Black . . . . .	487, 840, 850
— v. Sloan . . . . .	302, 304	— v. Wilson . . . . .	757, 759
— v. Small . . . . .	21	Spann v. Fox . . . . .	1119
— v. Smith . . . . .	104, 1227, 1245	— v. Nance . . . . .	1011
— v. Stone . . . . .	334	Sparmann v. Keim . . . . .	156
— v. Summerlin . . . . .	25	Sparrow v. Kohn . . . . .	208, 209
— v. Tarleton . . . . .	171, 178, 758, 759	Spaulding v. Kelly . . . .	296, 298
— v. Turner . . . . .	587	Spaunhorst v. Link . . . .	499, 1291
— v. Vanderburg . . . . .	54, 515	Speake v. Barrett . . . . .	513
— v. Virgin . . . . .	1540	— v. Prewitt . . . . .	625
— v. Walker . . . . .	40, 800, 1007, 1008	— v. White . . . . .	526
— v. Warden . . . . .	6, 469	Spear v. Crawford . . . . .	202
— v. Wilson . . . . .	127	— v. Gillett . . . . .	425
— v. Wright . . . . .	27, 77	— v. Newell . . . . .	1245
Smith's Estate . . . . .	1291, 1297	Spears v. Toland . . . . .	510
Smock v. Pierson . . . . .	1007	Speer v. Bishop . . . . .	522
Smyth v. Harvie . . . . .	249, 250, 385, 550	Spies v. Rosswog . . . . .	714, 1007
— v. Strader . . . . .	416	Spiro v. Paxton . . . . .	845
Snead v. Barringer . . . . .	427	Sprague v. Ainsworth . . .	321
Sneed v. Kelley . . . . .	272	— v. Zunts . . . . .	307
Snell v. Atlantic, etc. I. Co.	348	Sprague Mfg. Co. v. Hoyt .	759, 766
— v. Crowe . . . . .	840, 458	Sprawles v. Barnes . . . .	804
— v. De Land . . . . .	27	Springer v. Cabell . . . . .	1245
Sniffer v. Sass . . . . .	1323	— v. Shirley . . . . .	590
Snodgrass' Appeal . . . . .	1344	Sproat v. Porter . . . . .	121
Snodgrass v. Broadwell . . .	622	Sprout v. Crowley . . . . .	1231, 1245, 1250
— v. Reynolds . . . . .	66	Spruhen v. Stout . . . . .	319
Snow v. Burnett . . . . .	859	Spureck v. Leonard . . . .	342, 518, 519.
— v. Howard . . . . .	662		541, 1265
Snyder v. Burnham . . . . .	1538	Spurr v. Russell . . . . .	863
— v. Hall . . . . .	1139	Squiar v. Ford . . . . .	1079
— v. Leland . . . . .	1202	St. Armand v. Long . . . .	56
— v. Lunsford . . . . .	748, 775	St. John v. Hendrickson . .	383
— v. May . . . . .	333	— v. Holmes . . . . .	645
— v. Wolford . . . . .	170	St. Louis Electric Lamp Co.	
Sodiker v. Applegate . . . .	31, 40	— v. Manhall . . . . .	510
Sohrer v. Johnson . . . . .	210	St. Nicholas National Bk. v.	
Solomon v. Fitzgerald . . . .	1300	Savery . . . . .	291
— v. Kirkwood . . . . .	545, 1255	Staats v. Bristow . . . . .	797, 842
— v. Solomon . . . . .	21, 119, 205, 705	— v. Howlett . . . . .	445, 1011
Somerby v. Buntin . . . . .	16	Stafford v. Fargo . . . . .	736
Soule v. Frost . . . . .	1244	— v. Gold . . . . .	803
— v. Hayward . . . . .	26	Stafford Bank v. Palmer . .	8, 1535
South Bend Iron Works v.		Stage v. Gorich . . . . .	1132
Paddock . . . . .	292	Stahl v. Stahl . . . . .	1319
South Fork Canal Co. v. Gor-		Stainer v. Tysen . . . . .	413
don . . . . .	365	Stair v. Richardson . . . .	520
Southard v. Lewis . . . . .	802	Stalhart v. Knox . . . . .	1245
Southerland v. Steel . . . .	277	Stall v. Cassidy . . . . .	541
Southern v. Grim . . . . .	510	— v. Catskill Bank . . . .	296

Stammers v. McNaughten . . .	1085	Stephens v. Parkhurst . . .	684
Stanberry v. Cattell . . .	1245	Stephenson v. Cornell . . .	112
Stanchfield v. Palmer . . .	14	Sterling v. Brightbill . . .	772
Standard Oil Co. v. Scofield . . .	1084	Sterne v. Goep . . .	1292
Stanford v. Lockwood . . .	802	Stern's Appeal . . .	1309
Stanhope v. Suplee . . .	1303	Stettauer v. Carney . . .	34
Stanley v. Stark . . .	386	Steuben County Bank v. Al-	
Stannard v. Smith . . .	431	berger . . .	288
Stanton v. Buckner . . .	1245	Stevens v. Bank of Cent.	
— v. Lewis . . .	253	N. Y. . .	1342
— v. Westover . . .	826	— v. Faucet . . .	15, 380
Stanwood v. Owen . . .	1353	— v. Gainesville Nat. Bank . . .	40,
Staples v. Sprague . . .	30, 725		176
Stapleton v. King . . .	25	— v. Lunt . . .	625
Star Wagon Co. v. Swezey . . .	520	— v. Stevens . . .	1209
Stark v. Corey . . .	311	— v. Yeatman . . .	1142, 1143, 1256
— v. Noble . . .	999	Stevenson v. Mathers . . .	1090
Starr v. Case . . .	562, 895, 973, 1140,	Stewart, In re . . .	575, 846
	1297, 1303, 1305	Stewart v. Brown . . .	845
— v. Cosgrave . . .	Brewing	— v. Burkholter . . .	1090
Co. . .		— v. Caldwell . . .	306, 547
— v. Mayer . . .	858	— v. McKickan . . .	1172
State v. Baldwin . . .	1127	— v. Rogers . . .	579
— v. Bowden . . .	845	— v. Slater . . .	791
— v. Brower . . .	819	— v. Sonneborn . . .	541, 545
— v. Brown . . .	1297	— v. Spaulding . . .	630, 647
— v. Butman . . .	741	Stewart's Appeal . . .	613
— v. Donegan . . .	1127	Stewart's Assignment . . .	782
— v. Donnelly . . .	40	Stidger v. Reynolds . . .	973
— v. Emmons . . .	845	Stiernermann v. Cowing . . .	529
— v. Finn . . .	176	Stiles v. Meyer . . .	488
— v. Judge . . .	1194	Still v. Focke . . .	281, 284, 285, 797,
— v. Merritt . . .	654		858, 863, 1094
— v. Myers . . .	812, 1126	— v. Holbrook . . .	725, 1116, 1245
— v. Quick . . .	1232	Stillman v. Harvey . . .	357
— v. Spencer . . .	845	Stillwell v. Gray . . .	425
— v. Thomas . . .	780, 782, 846	Stinson v. Lewis . . .	1260
— v. Wiggin . . .	185	— v. Whitney . . .	288, 289, 512, 523
State Council v. Sharp . . .	1555	Stiness v. Pierce . . .	286
Stauffer's Succession . . .	845	Stirling v. Heintzman . . .	151, 630
Steadwell v. Morris . . .	1132	Stitt v. Cass . . .	572
Stearns v. Burnham . . .	519	Stittheimer v. Killip . . .	1131
— v. Haven . . .	19, 98	Stoallings v. Baker . . .	36
— v. Houghton . . .	530	Stockdale v. Ullery . . .	1181
Stebbins v. Harmon . . .	1103	Stockton v. Frey . . .	376
— v. Williard . . .	369, 525, 895, 896,	Stockwell v. Dillingham . . .	365
	1325	Stoddard v. Wood . . .	1240
Stecker v. Smith . . .	357	Stoddart v. Key . . .	209
Stediker v. Bernard . . .	661	Stokes v. Stevens . . .	369, 692
Steel v. Jennings . . .	312	Stone v. Boone . . .	1084
Steele v. First Nat. Bank . . .	725	— v. Chamberlain . . .	601
Steere v. Hoagland . . .	1178	— v. Fouse . . .	1227
Stegall v. Coney . . .	267, 369	— v. Manning . . .	835
Stegman v. Berryhill . . .	913	Stoolfoos v. Jenkins . . .	158
Stein v. Ladow . . .	280	Storer v. Hinkley . . .	287, 318, 1319,
— v. Robertson . . .	157, 819		1320
Steinhart v. Fyhrie . . .	280	Storm v. Roberts . . .	454
Stenburg v. Callanan . . .	499	Story v. Barrell . . .	276
Stephens v. Orman . . .	703, 1131	Stoughton v. Lynch . . .	705, 776, 971

Stout v. Baker . . . . .	454, 691	Sweet v. Morrison . . . . .	974, 1129
— v. Fortner . . . . .	1038	— v. Reed . . . . .	843, 859
— v. McNeill . . . . .	845	— v. Taylor . . . . .	1304
— v. Seabrook 1047, 1048, 1116,	1117	Sweetser v. French . . . . .	341
— v. Zulick . . . . .	7	Swift v. Carr . . . . .	542
Stoutenburgh v. Vander-		— v. Dean . . . . .	715
burgh . . . . .	647	— v. Mead . . . . .	515
Strader v. White . . . . .	73, 79	Switzer v. Smith . . . . .	1340
Straffin v. Newell . . . . .	340	Sylverstein v. Atkinson 289, 290	
Strang v. Bradner . . . . .	382	Sylvester v. Smith . . . . .	430, 625
Strange v. Graham . . . . .	808, 824		
Strassburger, In re . . . . .	1325	Tabb v. Gist . . . . .	268, 509, 860
Strattan v. Tabb 787, 797, 895, 1325		Taft v. Ruffum . . . . .	1281
Strauss v. Frederick . . . . .	1324	— v. Schwamb 755, 797, 820	
Strecker v. Conn 99, 178, 541, 542,	545	— v. Warde . . . . .	185, 1546
— v. Smith . . . . .	174	Taggart v. Phelps . . . . .	511
Stretch v. Talmadge . . . . .	1132	Tait v. Murphy . . . . .	842
Strickler's Appeal . . . . .	1326	Talbot v. Pierce . . . . .	824
Stroman v. Varn . . . . .	334, 335	Talcott v. Dudley . . . . .	1268
Strong v. Baker . . . . .	1174	Tallmadge v. Penoyer . . . . .	395
— v. Clawson . . . . .	1094	Tams v. Hitner . . . . .	101
— v. Fish . . . . .	339, 331	Tanner v. Hall . . . . .	300
— v. Hines . . . . .	648	Tapley v. Butterfield 279, 339, 347	
— v. Lord . . . . .	767, 770	Tappan v. Bailey . . . . .	1532, 1534
— v. Niles . . . . .	456	— v. Blaisdell . . . . .	841, 1344
— v. Place . . . . .	35	Tapping v. Paddock . . . . .	922
— v. Stapp . . . . .	859	Tarbell v. Bradley 754, 759, 765,	862
Stroud v. Stroud . . . . .	767	— v. West . . . . .	864
Struthers v. Pearce . . . . .	713	Tarlton v. Herbert . . . . .	631
Stumph v. Bauer . . . . .	747, 843	Tassey v. Church 276, 637, 694	
Sturges v. Swift . . . . .	1236	Tate v. Clements . . . . .	616
Sullivan v. Campbell . . . . .	1534	Taunton Iron Co. v. Rich-	
— v. Smith . . . . .	280, 281	mond . . . . .	537
Summey v. Patton . . . . .	766	Tay v. Ladd . . . . .	370
Sun Insurance Co. v. Kountz		Taylor v. Bush . . . . .	40, 175, 176
Line . . . . .	23, 99	Taylor v. Bass . . . . .	684
Surrogate Court of Went-		— v. Bemis . . . . .	1210
worth, In re . . . . .	1296	— v. Castle . . . . .	1295, 1539
Surtell v. Brailsford . . . . .	162	— v. Cawthorne . . . . .	1274
Sutcliffe v. Dohrman . . . . .	842	— v. Coffing . . . . .	945
Sutlive v. Jones 334, 337, 754, 757		— v. Cook . . . . .	271, 272
Sutton v. Dillaye . . . . .	526	— v. Coryell . . . . .	277
— v. Irwine . . . . .	341	— v. Farmer 766, 768, 797, 825,	1324
— v. Mandeville . . . . .	1172	— v. Hancock . . . . .	468
Swails v. Coverdill . . . . .	633	— v. Henderson . . . . .	189, 661
Swallow, The . . . . .	76	— v. Herring . . . . .	1173
Swan v. Smith . . . . .	787	— v. Hill . . . . .	519
— v. Stedman . . . . .	337	— v. Hillyer . . . . .	413, 537
Swann v. Sanborn 53, 189, 1325,	1331	— v. Hutchison . . . . .	1155
Swanston v. Lishman . . . . .	1108	— v. McDonald . . . . .	858
Swearingen v. Bassett 767, 778,	845	— v. Penny . . . . .	860
Sweeney v. Neely . . . . .	925, 971	— v. Peterson . . . . .	925
— v. Stanford . . . . .	210	— v. Post . . . . .	245
Sweet v. Bradley . . . . .	365	— v. Rasch . . . . .	480
— v. Erwin . . . . .	632	— v. Smith . . . . .	1249
		— v. Sotolingo . . . . .	40
		— v. Taylor . . . . .	358, 820

Taylor v. Terme . . . . .	73, 79	Thompson v. Walker . . . . .	1081
— v. Webster . . . . .	179, 480	Thompson's Appeal . . . . .	788
— v. Wilson . . . . .	1331	Thomson v. Thomson . . . . .	811
— v. Young . . . . .	516, 926	Thomson's Estate . . . . .	120
Teas v. Woodruff . . . . .	14	Thorn v. Smith . . . . .	275
Tebbets v. Dearborn . . . . .	345	Thornton v. Bussey . . . . .	1323
Teigley v. Whitaker . . . . .	1296	— v. Kerr . . . . .	189
Teller v. Patten . . . . .	189	Thrall v. Crampton . . . . .	1377
— v. Wetherell . . . . .	803	— v. Seward . . . . .	323
Temple v. Seaver . . . . .	533	Thurber v. Corbin . . . . .	587, 1021
Tenney v. Foote . . . . .	382	— v. Jenkins . . . . .	587, 1021
— v. Johnson . . . . .	785	Thurston v. Horton . . . . .	131
— v. N. E. Protective Union . . . . .	1532, 1534, 1537	— v. Lloyd . . . . .	290
— v. Simpson . . . . .	759, 1081	— v. Perkins . . . . .	510
Terrell v. Goddard . . . . .	1201	Thwing v. Clifford . . . . .	382
— v. Hurst . . . . .	845, 846	Tibbatts v. Tibbatts . . . . .	50
— v. Ingersoll . . . . .	1183, 1194	Tibbetts v. Blood . . . . .	1547, 1549
— v. Rowland . . . . .	895	Tidd v. Rives . . . . .	763
Terrill v. Richards . . . . .	174	Tidewater Pike Co. v. Kitchenman . . . . .	486
Terry v. Berry . . . . .	767, 845	— v. Satterfield . . . . .	485
— v. Butler . . . . .	1324	Tiemann v. Molliter . . . . .	287
— v. Carter . . . . .	1223	Tiernan v. Doran . . . . .	263
Terry, In re . . . . .	486	Tiffany v. Crawford . . . . .	1348
Tessier v. Crowley . . . . .	343	— v. Williams . . . . .	1548
Texas & St. L. R. Co. v. McCaughy . . . . .	647	Tilford v. Ramsey . . . . .	300, 440
Thayer v. Augustine . . . . .	30	Tillar v. Cook . . . . .	3, 797, 1058, 1188
— v. Barney . . . . .	708	Tillier v. Whitehead . . . . .	301, 421
— v. Lane . . . . .	768	Tillinghast v. Champlin . . . . .	782, 783
Theall v. Lacey . . . . .	950	Tillotson v. Tillotson . . . . .	1296
Theller v. Such . . . . .	811	Till's Case . . . . .	845
Theriot v. Michel . . . . .	756	Tindal v. Bright . . . . .	637
Third Nat'l Bank v. Snyder . . . . .	304	Tipton v. Nance . . . . .	1239
Thomas, In re . . . . .	308	Turrell v. Jones . . . . .	920, 922
Thomas v. Brown . . . . .	647	Titus v. Todd . . . . .	585
— v. Ellmaker . . . . .	1532, 1334	Tobey v. McFarlin . . . . .	845
— v. Green . . . . .	98	— v. Wood . . . . .	160
— v. Lines . . . . .	734, 951	Tobias v. Blin . . . . .	37
— v. Lusk . . . . .	837, 859	Todd v. Jackson . . . . .	258, 379
— v. Miles . . . . .	999	— v. Lorah . . . . .	297, 328
— v. Moore . . . . .	187, 199	— v. Rafferty . . . . .	705, 1117
— v. Stetson . . . . .	327	Tolan v. Carr . . . . .	1155
— v. Wolcott . . . . .	189	Tolford v. Tolford . . . . .	1244
Thompkins v. Thompkins . . . . .	913	Tolman v. Hanrohen . . . . .	443
Thompson v. Bowman . . . . .	754	Tom v. Goodrich . . . . .	425
— v. Egbert . . . . .	764	Tombeckbee Bank v. Durnell . . . . .	531
— v. First . . . . .	842	Tombs v. Hill . . . . .	1323
— v. Gray . . . . .	209, 1008	Tomlin v. Goldsmith . . . . .	178, 198
— v. Hale . . . . .	416	Tomlinson v. Burk . . . . .	628, 629
— v. Howard . . . . .	268	— v. Hammond . . . . .	866
— v. Lewis . . . . .	844	— v. Nelson . . . . .	683
— v. Lowe . . . . .	1128, 1128, 1237	— v. Ward . . . . .	702, 916, 1209
— v. Meisser . . . . .	1535	Tompkins v. Woryard . . . . .	413
— v. Mylne . . . . .	735, 952	Tone v. Goodrich . . . . .	804
— v. National Bank . . . . .	99	Toof v. Duncan . . . . .	262
— v. Pennich . . . . .	330	Topliff v. Jackson . . . . .	1019
— v. Steamboat Morton . . . . .	1247	— v. Vail . . . . .	1338
— v. Tinnin . . . . .	790	Topping v. Paddock . . . . .	725

Torrey v. Baxter . . . . .	533	Tuttle v. Eskridge . . . . .	424
— v. Twombly . . . . .	1242	Tweed v. Lowe . . . . .	951
Tournade v. Hagedorn . . . . .	470	Tyler v. Scott . . . . .	33
— v. Methfessel . . . . .	470	Tynburg v. Cohen . . . . .	647, 665
Towle v. Meserve . . . . .	1245	Tyner v. Stoops . . . . .	585
— v. Pierce . . . . .	1088	Tyng v. Thayer . . . . .	1139, 1155
Town v. Hendee . . . . .	267	Tyree v. Lyon . . . . .	292, 296, 297, 328
— v. Mason . . . . .	99	Tyrrell v. Washburn . . . . .	202, 1537
Towne v. Leach . . . . .	843		
Townsend v. Goewey . . . . .	1532	Uhl v. Bingham . . . . .	541, 544
Townsend v. Stevenson . . . . .	585	— v. Harvey . . . . .	510, 545, 546
Tracy v. Walker 123, 780, 782, 825, 1268, 1324		Uhler v. Browning . . . . .	414
Trafford v. Hubbard . . . . .	840, 841	— v. Semple 702, 759, 767, 771, 832	
Travers v. Crane . . . . .	240	Ulg v. Ginrich . . . . .	302
Travis v. Tobias . . . . .	627	Ulman v. Briggs . . . . .	469, 470
Treadwell v. Brown 844, 1324, 1327		Umburger v. Plume . . . . .	577
— v. Wells . . . . .	547	Union Bank v. Bulmer . . . . .	289, 291, 300
— v. Williams . . . . .	775	— v. Eaton . . . . .	414
Treat v. Hiles . . . . .	169	— v. Hall . . . . .	534
Tredwell v. Roscoe . . . . .	851	Union, etc. Bank v. Underhill . . . . .	270, 293
Tregerthen v. Lohrum . . . . .	514	Union, etc. Bank of Memphis v. Day . . . . .	313
Trentman v. Swartzell . . . . .	780	Union Nat'l Bank v. Bank of Commerce . . . . .	1239, 1323
Trenwith v. Meeser . . . . .	644	United States v. Astley . . . . .	333
Trickett v. Moore . . . . .	859	— v. Duncan . . . . .	1341
Trimble v. Coons . . . . .	333	— v. Glab . . . . .	234
— v. More . . . . .	1378	— v. McGinnis . . . . .	380
Tripp v. Williams . . . . .	275	— v. Thomasson . . . . .	380
Trott v. Irish . . . . .	627	— v. Thompson . . . . .	569
Trowbridge v. Cross 765, 767, 798, 845		— v. Williams . . . . .	839, 851
— v. Scudder . . . . .	468	United States Bank v. Binney . . . . .	278, 407, 437, 958, 1173
Troy, etc. Factory v. Corning . . . . .	1225, 1537	U. S. Express Co. v. Bedbury . . . . .	631, 1545
Troy Iron & Nail Factory v. Winslow . . . . .	806, 807, 1318	U. S. Nat'l Bank v. Burton . . . . .	351
Truesdell v. Baker . . . . .	1258	Unruh's Estate . . . . .	819
Truitt v. Baird . . . . .	1228	Updegraff v. Rowland . . . . .	790
Trullinger v. Corcoran . . . . .	288	Urdike v. Doyle . . . . .	499, 1096
Trump v. Baltzell . . . . .	867, 898	Upham v. Hewitt . . . . .	75
Tucker v. Adams . . . . .	210, 692	Upson v. Arnold . . . . .	778, 787
— v. Cole . . . . .	351	Urquhart v. Powell . . . . .	411
— v. Peaslee . . . . .	429, 1242	Utle v. Smith . . . . .	904
Tudarman v. Newhall . . . . .	569		
Tudor v. White . . . . .	541	Vaccaro v. Toof . . . . .	518, 541
Turbeyville v. Ryan . . . . .	334, 336, 338	Valentine v. Hickie . . . . .	749
Turk v. Nicholson . . . . .	551	Vallandingham v. Duval . . . . .	659
Turnbow v. Broach . . . . .	587	Vallett v. Parker . . . . .	290
Turner v. Bissell . . . . .	14, 80	Van Alstyne v. Cook . . . . .	485
— v. Jaycox . . . . .	790	Van Brunt v. Applegate . . . . .	774, 842
— v. McIlhaney . . . . .	179	— v. Mather . . . . .	289
— v. Otis . . . . .	1132	Vance v. Blair . . . . .	1224
— v. Ross . . . . .	618	— v. Campbell . . . . .	371
— v. Smith . . . . .	853	— v. Cowing . . . . .	1320
— v. Turner . . . . .	878, 925	— v. Funk . . . . .	189
Turnipseed v. Goodwin . . . . .	820, 1277	— v. Kirk . . . . .	632, 633
Tutt v. Addams . . . . .	299		
— v. Land . . . . .	920, 921, 932		
Tuttle v. Cooper . . . . .	664		

Vandegrift v. Redheffer . . .	840	Wadley v. Jones . . .	1105, 1140, 1234
Vandenhewvil v. Storrs . . .	808	Wadsworth v. Manning . . .	34, 1228
Vanderburg v. Bassett . . .	319	Waggoner v. Gray . . .	1037
Vanderburgh v. Hull . . .	31	Wagner v. Clay . . .	413
Vanderwick v. Summerl . . .	400	— v. Fresche . . .	312
Van Deusen v. Blum . . .	425	— v. Simmons . . .	303
Van Dike v. Rossbram . . .	469	— v. Wagner . . .	1124, 1125
Vandike's Appeal . . .	842, 1343	Wait v. Brewster . . .	523, 547
Van Doren v. Horton . . .	535	Waite v. Dodge . . .	55, 625
Vanduzer v. McMillan . . .	897	— v. Foster . . .	533
Van Dyke v. Jackson . . .	1002, 1010	— v. Mathews . . .	845
Van Eps v. Dillaye . . .	661	Walcott v. Carfield . . .	267
Van Ingen v. Whitman . . .	469, 474, 475	Waldeck v. Brande . . .	550
Van Keuren v. Parmalee . . .	616	Walden v. Sherburne . . .	274
Van Kuren v. Trenton . . .	1182	Waldo v. Beckwith . . .	179
Vanness v. Dubois . . .	881	Waldo Bank v. Greeley . . .	290
Van Ness v. Fisher . . .	963, 1268	— v. Lumbert . . .	287
— v. Forest . . .	1229	Waldron, In re . . .	444
— v. Van Ness . . .	950	Waldron v. Simmons . . .	1319
Van Rensselaer v. Emery . . .	1197	Walkenshaw v. Perzel . . .	484, 1041
Van Rossum v. Walker . . .	1332	Walker v. Brown . . .	99
Van Scoter v. Lefferts . . .	368	— v. Bean . . .	277
Van Slyck v. Skinner . . .	772	— v. Clark . . .	648
Van Staden v. Kline . . .	759, 767	— v. Galbrath . . .	802
Vansyckle v. Rorback . . .	158	— v. Goodrich . . .	249, 550
Van Tagen v. Roberts . . .	962, 1275	— v. Hirsch . . .	50
Vanuxem v. Bostwick . . .	549	— v. House . . .	1296
Van Valen v. Russell . . .	693	— v. Kee . . .	288
Van Valkenburg v. Bradley . . .	531	— v. Marine National Bank . . .	1331
Van Wagner v. Chapman . . .	1223	— v. McCullock . . .	570
Varnell v. Anderson . . .	585	— v. Ogden . . .	1540
Vassar v. Camp . . .	32	— v. Spencer . . .	42
Venable v. Leick . . .	260, 357, 360	— v. Trott . . .	1181
Venal v. W. Va. Oil Co. . .	622	— v. Wait . . .	1249, 1294, 1296
Vernon v. Manhattan Co. . .	541	— v. Whipple . . .	963, 1255
— v. Upson . . .	1332	Walker, Re . . .	1323
— v. Vernon . . .	1296	Wall v. Balcom . . .	19
Vetterlein, In re . . .	380	Wallace v. Berger . . .	189, 190
Vetterlein v. Barnes . . .	529	— v. Fitzsimmons . . .	805
Vienne v. Harris . . .	262	— v. Hull . . .	1245
Vietor v. Henlein . . .	283	— v. Mulligan . . .	1190
Vigers v. Sainet . . .	1532, 1534	— v. Rippon . . .	162
Viles v. Bangs . . .	370	— v. Robinson . . .	1084
Villa v. Jones . . .	469	— v. Wallace . . .	772
— v. Jonte . . .	178	— v. Yeager . . .	370
Vinal v. Burrill . . .	528	Wallace's Appeal . . .	841, 863
Vincent v. Martin . . .	1353	Waller v. Davis . . .	1280
Vinson v. Beveridge . . .	40, 177	— v. Keyes . . .	293
Volger v. Ray . . .	1535	— v. Thomas . . .	1548
Von Schmidt v. Huntington . . .	1554	Walmsley v. Mendelsohn . . .	1092, 1311
Von Yagen v. Roberts . . .	1080	Walpole v. Renfro . . .	913
Voorhees v. Childs . . .	802, 1320	Walsh v. Adams . . .	849
— v. Jones . . .	40	— v. Cane . . .	616
Vosper v. Kramer . . .	833	Walstrom v. Hopkins . . .	584
Wabrath v. Viley . . .	98	— v. Lennon . . .	307, 334
Waco Water Co. v. Sanford . . .	1218	Walter v. Davis . . .	518
Wade v. Rusher . . .	824, 831, 1040	Walton v. Tosten . . .	336
		Walworth v. Henderson . . .	296
		Wamsley v. Lindenberger . . .	664

Warbritton v. Cameron . . . . .	1225	Weatherly v. Hardman . . . . .	1379
Ward, In re . . . . .	30, 40, 52, 53, 55	Weaver v. Ashcroft . . . . .	780, 840
Ward v. Barber . . . . .	526, 641	— v. Tapscott . . . . .	425
— v. Brighame . . . . .	21	— v. Upton . . . . .	897
— v. Bodeman . . . . .	138	— v. Weaver . . . . .	1335
— v. Gaunt . . . . .	125	Webb v. Allington . . . . .	302
— v. Howell . . . . .	537, 616	— v. Fordyce . . . . .	947
— v. Leviston . . . . .	626	— v. Helion . . . . .	1039
— v. Motter . . . . .	606	— v. Leggett . . . . .	40
— v. Newell . . . . .	479, 484	Weber v. Defor . . . . .	1260
— v. Tyler . . . . .	531	Weddle v. Stone . . . . .	1302
— v. Woodburn . . . . .	790	Weed v. Richardson . . . . .	413
Warder v. Hewdgate . . . . .	681	Weeks v. McClintock . . . . .	895
Wardwell v. Haight . . . . .	541	— v. Rake Co. . . . .	334
Ware, Ex parte . . . . .	802	Weil v. Jones . . . . .	651
Ware v. Owens . . . . .	756	Weinrich v. Koelling . . . . .	780
Waring v. Robinson . . . . .	644	Weise v. Moore . . . . .	1291, 1296, 1301
— v. Waring . . . . .	1207	Weisenfeld v. Stevens . . . . .	286
Warner v. Griswold . . . . .	220, 250	Weld v. Peters . . . . .	768
Warren, In re . . . . .	119, 444, 1324	Weldon v. Beckel . . . . .	1145
Warren v. Able . . . . .	1324	Welker v. Wallace . . . . .	396
— v. Ball . . . . .	508	Welles v. March . . . . .	260, 280, 281
— v. Burnham . . . . .	684	Wells v. Babcock . . . . .	22, 30, 35, 920,
— v. Dickson . . . . .	1232	— . . . . .	923, 926, 1144, 1150
— v. Farmer . . . . .	584, 1324, 1328	— v. Brown . . . . .	1116
— v. French . . . . .	414	— v. Carpenter . . . . .	1226
— v. Schainwald . . . . .	704	— v. Clarkson . . . . .	454
— v. Taylor . . . . .	825, 835	— v. Ellis . . . . .	860
— v. Wallis . . . . .	790, 845	— v. Erstein . . . . .	1124
— v. Warren . . . . .	1038	— v. Evans . . . . .	296, 334
— v. Wheelock . . . . .	1139	— v. Gates 1532, 1536, 1543, 1547	
Warring v. Hill . . . . .	1019	— v. McGeoch . . . . .	205, 1144, 1175
Washburn v. Bank of Bel-		— v. Mitchell . . . . .	368
lows Falls . . . . .	1324	— v. Stranger . . . . .	1037, 1182
— v. Goodman . . . . .	456	— v. Turner . . . . .	261
— v. Walworth . . . . .	542	— v. Wilson . . . . .	871
— v. Washburn . . . . .	708	Welsh v. Canfield . . . . .	821
Wass v. Atwater . . . . .	40	— v. Speakman . . . . .	191
Wastbay v. Williams . . . . .	1328	Welt v. Bird . . . . .	1245
Waterbury v. Express Co. . . . .	724,	Wentworth v. Raiguel . . . . .	397, 1252
— . . . . .	725, 1191, 1265, 1544, 1554	Werner v. Leisen . . . . .	1275
Waterman v. Dutton . . . . .	356	Wescott v. Fargo . . . . .	1551
— v. Hunt . . . . .	1330, 1331	— v. Price . . . . .	1245
Watkins v. Terre Haute, etc.		— v. Tyson . . . . .	716
R'y . . . . .	22	West v. Chosten . . . . .	833
Watkinson v. Bank of Penn-		— v. Hickory Mining Ass'n . . . . .	766
sylvania . . . . .	545	Westerlo v. Everton . . . . .	1242
Watson v. Fletcher . . . . .	773, 892	Western Assurance Co. v.	
— v. Lovelace . . . . .	952	Fowle . . . . .	271, 272
— v. Miller . . . . .	802	Western Stage Co. v. Walker . . . . .	527,
— v. Owens . . . . .	606	— . . . . .	701, 725
Watt v. Kirby . . . . .	429, 430	Weston v. Ketcham . . . . .	714
Watterson v. Patrick . . . . .	174	— v. Watts . . . . .	1206
Watts v. Rice . . . . .	654, 858	Westphal v. Henney . . . . .	1036
— v. Sayre . . . . .	681	West Point Fdy. Association	
Waugh v. Mitchell . . . . .	669, 801	v. Brown . . . . .	7, 1547
Way v. Travel . . . . .	663	Wetherald v. Shupe . . . . .	483
— v. Stebbins . . . . .	740, 769, 808,	Wetherell v. McClosky . . . . .	487
— . . . . .	1212	Wetler v. Shlieper . . . . .	280

Weyer v. Thornburgh . . .	1319	Whitesides v. Lee . . .	511
Whaley v. Moody . . .	296	Whitewright v. Stimpson . . .	485
Wharton v. Clements . . .	354	Whiting v. Leakin . . .	734
— v. Woodburn . . .	312	— v. Furrant . . .	549
Wheat v. Hamilton . . .	499	— v. Leakin . . .	40, 183, 1255
Wheatly v. Calhoun . . .	715, 754, 756	Whitlock v. McKechnie . . .	238
— v. Tutt . . .	642	Whitman v. Boston . . .	800
Wheeler v. Arnold . . .	880, 1235	— v. Bowden . . .	707
— v. Bullard . . .	660	— v. Keith . . .	1548
— v. Farmer . . .	37	— v. Leonard . . .	511, 520, 1277
— v. Rice . . .	414	— v. Porter . . .	34, 889
— v. Sage . . .	709	— v. Robinson . . .	1195
Whelen v. Harrison . . .	156, 917, 1068,	Whitmore v. Adams . . .	414
	1069	— v. Parks . . .	1020
Whetstone v. Shaw . . .	1232, 1235	— v. Shiverick . . .	808, 828
Whigham's Appeal . . .	869	Whitney v. Cotton . . .	759, 765, 1321
Whilldin v. Bullock . . .	482	— v. Dutch . . .	156
Whipple v. Hill . . .	1325	— v. Hirsch . . .	283
— v. Parker . . .	6, 1535	— v. Ludington . . .	75
Whitcomb v. Converse . . .	920, 945,	— v. Sterling . . .	191
	946	Whittaker v. Brown . . .	290, 309, 312
— v. Fowle . . .	787	— v. Collins . . .	659
White, In re . . .	590	Whittemore v. Elliott . . .	664
White v. Brownell . . .	1549, 1550	Whitton v. Smith . . .	636
— v. Chapin . . .	833	Whitwell v. Warner . . .	560
— v. Colfax . . .	825	Whitworth v. Ballard . . .	518
— v. Conway . . .	1118	— v. Benbow . . .	778
— v. Dougherty . . .	841, 1325	— v. Harris . . .	1058, 1059
— v. Fitzgerald . . .	19	— v. Patterson . . .	281
— v. Gibson . . .	361	Wickham v. Davis . . .	853
— v. Hackett . . .	484, 1334	Wickliffe v. Eve . . .	1039
— v. Harlow . . .	1242	Widdifield v. Widdifield . . .	178
— v. Jones . . .	319, 626, 840, 998,	Wiegand v. Copeland . . .	759, 770
	1005, 1182	Wieman v. Anderson . . .	162
— v. Kearney . . .	263, 529	Wiesenfeld v. Byrd . . .	560, 806, 809
— v. Murphy . . .	541	Wiggin v. Cumings . . .	1248
— v. Parish . . .	780, 1343	— v. Goodwin . . .	1247
— v. Savery . . .	627	— v. Tudor . . .	571
— v. Smith . . .	465	Wilby v. Phinney . . .	1232
— v. Thielens . . .	499	Wilcox v. Dodge . . .	22, 31, 335
— v. Tudor . . .	533, 661	— v. Jackson . . .	280
— v. Union Ins. Co. . .	537, 1324	— v. Kellogg . . .	780
— v. Wagann . . .	734	— v. Matthews . . .	177, 826
— v. Waide . . .	1250	— v. Wilcox . . .	768
— v. Whaley . . .	98, 179, 189	Wild v. Davenport . . .	109, 177, 1351,
— v. White . . .	1087, 1095		1360
— v. Woodward . . .	850	— v. Dean . . .	584
Whitehall v. Shickle . . .	40, 1223,	Wilde v. Jenkins . . .	601
	1224	Wilder v. Keeler . . .	1324
Whitehead v. Bank of Pitts-		— v. Morris . . .	530
burg . . .	526	— v. Weakley . . .	161
— v. Chadwell . . .	1325	Wilder's Succession . . .	1303
— v. Howard . . .	963	Wildes v. Fessenden . . .	576
White Mountain Bank v.		Wiles v. Maddox . . .	839
West . . .	779	Wiley v. Allen . . .	329
White Sewing Machine Co.		— v. Logan . . .	622
v. Hines . . .	259	— v. Sledge . . .	858
Whitesides v. Collier . . .	1223	— v. Stewart . . .	376
— v. Lafferty . . .	710	Wilgus v. Lewis . . .	497



Wilkerson v. Allen . . .	776	Wilmot v. Steamer . . .	644
Wilkins v. Davis . . .	1268, 1269	Wilson v. Bowden . . .	791
— v. Pearce . . .	343	— v. Brown . . .	304
Wilkinson v. Griswold . . .	550	— v. Cobb . . .	18
— v. Jett . . .	46	— v. Colman . . .	179, 197
— v. Tilden . . .	1181	— v. Conine . . .	1324, 1342
— v. Yale . . .	787	— v. Dargan . . .	332
Willard v. Decatur . . .	1190	— v. Fenimore . . .	1232
Willet v. Stringer . . .	347, 395	— v. Forder . . .	301
Willey v. Carter . . .	754, 768	— v. Hone . . .	457
Williams, In re . . .	1325, 1334	— v. Horne . . .	660
Williams v. Bank of Michi- gan . . .	1532, 1535, 1536	— v. Hunter . . .	337
— v. Barnett . . .	366, 369, 411	— v. Jennings . . .	605
— v. Birch . . .	541	— v. Lineberger . . .	897
— v. Bowers . . .	541	— v. Loomis . . .	162
— v. Boyd . . .	877	— v. Lovelace . . .	179
— v. Brimhall . . .	330	— v. McConnell . . .	1323
— v. Connor . . .	119, 287, 542	— v. Nicholson . . .	802, 1298, 1299
— v. Frost . . .	281	— v. Richards . . .	289, 297, 411
— v. Gage . . .	782, 841, 851, 1342	— v. Roger . . .	632
— v. Gilchrist . . .	413	— v. Simpson . . .	810, 1294
— v. Gillispie . . .	281	— v. Soper . . .	802, 808, 940, 1338
— v. Gillies . . .	73, 171, 424	— v. Stewart . . .	240, 507
— v. Henshaw . . .	1235	— v. Stilwell . . .	1021
— v. Hitchings . . .	570	— v. Strobach . . .	840, 844, 849
— v. Hodgson . . .	338	— v. Torbet . . .	537
— v. Love . . .	824, 831	— v. Wallace . . .	625, 626
— v. Mathews . . .	506	— v. Waugh . . .	615, 616
— v. Moore . . .	408, 772	— v. Williams . . .	413
— v. Muthersbaugh . . .	660, 858	— v. Wilson . . .	220
— v. Nicholson . . .	1040	Wilson-O'Bear Grocery Co. v. Cole . . .	382, 858
— v. Roberts . . .	366, 367	Wimpee v. Mitchell . . .	1319
— v. Rogers . . .	407, 607, 659, 660, 661	Winchester v. Thayer . . .	157
— v. Saginaw . . .	234	— v. Whitney . . .	189
— v. Sheldon . . .	759, 776	Windham County Bank v. Kendall . . .	307
— v. Souter . . .	182	Wingarden v. Verhage . . .	1144
— v. Stevens . . .	679	Wing Ho v. Baldwin . . .	210
— v. Wallbridge . . .	298, 418	Winship v. United States Bank . . .	21, 50, 265, 318
— v. Whedon . . .	282	Winslow v. Cheffelle . . .	184, 771
— v. Whitmore . . .	320, 528	Winston v. Ewing . . .	859
— v. Wilson . . .	1007	— v. Taylor . . .	505
Williamson v. Adams . . .	782, 826	Wintersmith v. Pointer . . .	1323
— v. Fountain . . .	766	Wise v. Copley . . .	681
— v. Fox . . .	548	— v. Frey . . .	845
— v. Haycock . . .	1089	— v. Williams . . .	107, 632
— v. McGinnis . . .	569	Wisham v. Lippincott . . .	1327
— v. Munroe . . .	1203	Wiswall v. Ayres . . .	1173
— v. Wilson . . .	1200, 1268, 1291	Witbeck v. Chittenden . . .	1297, 1298
Williar v. Irwin . . .	100, 197	Witcher v. Brewer . . .	378
Willings v. Consequa . . .	569	Witherhead v. Allen . . .	1550, 1551
Willis v. Bremner . . .	233	Withers v. Withers . . .	971
— v. Freeman . . .	1324	Witler v. Richards . . .	841, 842
— v. Hill . . .	423	Witter v. McNeil . . .	432
Wills v. Cutler . . .	258	— v. Richards . . .	1339
— v. Simmons . . .	25, 1223, 1228	Wittkowsky v. Reid . . .	320
Willson v. Ficher . . .	1200	Wittram v. Van Wormer . . .	304
— v. Owen . . .	1538		

Woddrop v. Ward . . .	1323	Wright v. Harris . . .	649
Wolbert v. Harris . . .	1203	— v. Herrick . . .	1339
Wolf v. Kahn . . .	211	— v. Hooker . . .	237, 441
— v. Lamborn . . .	629	— v. Jacobs . . .	1247
— v. Mills . . .	382	— v. Michie . . .	1224
Wolfe v. Gilmer . . .	819	— v. Powell . . .	110
Wolff v. Shelton . . .	1146	— v. Putnam . . .	1552
Wolle v. Brown . . .	270	— v. Storrs . . .	802
Wonson v. Fenno . . .	358	— v. Troop . . .	899
Wood v. Barber . . .	617	— v. Ward . . .	839, 840, 854, 1035
— v. Beatt . . .	83	— v. Williamson . . .	622
— v. Brush . . .	681	Wyckoff v. Anthony . . .	333
— v. Connell . . .	275	Wyckoff v. Purnell . . .	1232
— v. Cullen . . .	109	Wyman v. Chicago, etc. R.	
— v. Erie Railway Co. . .	209, 241	R. Co. . .	105
— v. Fox . . .	1124	Wynn v. Woods . . .	497
— v. Franks . . .	584	Yale v. Eames . . .	533
— v. Gault . . .	1258	— v. Yale . . .	370
— v. Goss . . .	363	Yamato Trading Co. v.	
— v. Johnson . . .	869	Hoexter . . .	157
— v. Merrow . . .	1232	Yancey v. Marriott . . .	189
— v. Montgomery . . .	754	Yandes v. Lefavour . . .	319, 537, 610
— v. O'Kelly . . .	625	Yarbrough v. Bush . . .	692
— v. Pennell . . .	105	Yates v. Watson . . .	659
— v. Quarles . . .	193	Yeager v. Wallace . . .	411, 725
— v. Samuels . . .	183	Yeatman v. Woods . . .	766
— v. Shepherd . . .	277, 278	Yerkes v. Podrock . . .	197
— v. Vallette . . .	14, 50, 73	Yocum v. Benson . . .	186
Woods v. Wilder . . .	154	Yoeman v. Lasley . . .	119, 124
— v. Wood . . .	1310	Yoke v. Barnet . . .	946, 1176
Woodbury v. Sackrider . . .	352	Yonger v. Skinner . . .	161
Woodford v. Dorwin . . .	531	York v. Clemens . . .	178, 1250
Woodling v. Knickerbocker . . .	377	— v. Orton . . .	499
Woodruff v. King . . .	339, 346, 347, 510	York County Bank's Appeal . . .	644, 694
— v. Scaife . . .	318	Yorkshire Bank v. Beatson . . .	295
Woodmanson v. Holcomb . . .	780, 781	Young v. Brick . . .	1245
Woods v. Woods . . .	321	— v. Clute . . .	944
Woodward v. Clark . . .	3	— v. Dunn . . .	798
— v. Cowing . . .	124	— v. Pearson . . .	1104
— v. Francis . . .	1176	— v. Smith . . .	112, 273
— v. Horst . . .	329	— v. Stevens . . .	160
— v. Newhall . . .	664	— v. Tibbitts . . .	544
Woodward's Case . . .	220	Younglove v. Liebhardt . . .	1245
Woodworth v. Downer . . .	528, 531	Zeisler v. Steinmann . . .	116
Woolridge v. Irving . . .	846	Zell's Appeal . . .	905
Worthington v. MacDonald . . .	987	Zimmermon v. Erhard . . .	162, 164, 207, 238
Wotherspoon v. Wother- spoon . . .	629	— v. Huber . . .	894, 901
Wright v. Ames . . .	258	Zane v. Thomas . . .	228
— v. Brosseau . . .	498	Zollar v. Janvrin . . .	541
— v. Cumptsy . . .	1235	Zook v. Clemens . . .	764
— v. Delaware, etc. Canal Co. . .	23	Zuel v. Bowen . . .	289
— v. Eastman . . .	1230		

# THE LAW OF PARTNERSHIP.

---

## BOOK III.

OF THE RIGHTS AND OBLIGATIONS OF MEMBERS OF PARTNERSHIPS BETWEEN THEMSELVES.

[CONTINUED FROM VOLUME I.]



OF THE DIVISION OF PROFITS.

**Division of profits.**—The realization and division of profit is the ultimate object of every partnership; and the right of every partner to a share of the profits made by the firm to which he belongs is too obvious to require comment. Where there is no right to share profits there can be no partnership, and almost all the other rights possessed by partners may be said to be incidental to the right in question.

**Times, etc., of division.**—The times at which the profits are to be divided, the *quantum* to be divided at any one time, the sums, if any, which are to be placed to the debit of the firm in favor of any particular partner for salary, interest on capital, etc., before any profits are to be divided, these and all similar matters are usually made the subject of express agreement;<sup>1</sup> but where no such agreement has

<sup>1</sup> Where the defendants, in 1850 entered into a contract with a firm in Porto Rico for the transacting of business between Porto Rico and New York, by the terms of which it was provided that each of the defendants should be entitled to one-third of the profits of such business, and, in 1851, they entered into articles of copartnership with the plaintiffs, by which it was provided "that the plaintiffs should be interested in said business, and that all shipments made in pursuance of said contract should be on joint account; that the plaintiffs should be one-third interested, and that the defendants should repre-

sent the then two-thirds interest," it was held that the share of the plaintiffs in the profits of the entire business transacted under said contracts was not, as claimed by the defendants, one-third of three-fourths, but one-third thereof. *Pond v. Clark*, 24 Conn. 370.

G. guaranteed his partner, B., \$10,000 profits the first year, "notwithstanding losses to any extent," and at the end of the year the partnership was dissolved and no profits made. *Held*, that B. was entitled to receive from G. the \$10,000. *Grant v. Bryant*, 101 Mass. 567.

As to the proportion in which

been made, and no tacit agreement relative to them can be inferred, the principles laid down in the preceding chapter

the profits of a partnership should be divided on a final accounting under the terms of articles stipulating that money should be advanced by the partners in equal proportion, in instalments, whenever it shall be required, and that the parties shall be entitled to the clear net profits in the several proportions which their several interests bear to the total amount then paid in, see *Fulmer's Appeal*, 90 Pa. St. 143.

The phrase "ten per cent. on the business" construed to mean ten per cent. of the profits of the business. *Funck v. Haskell*, 132 Mass. 580.

Where an agreement was made by which one party sold and conveyed, with four others, four undivided fifths of certain land for a certain sum payable in instalments, under an agreement that the vendor and the purchasers should enter into partnership, quarry stone on the lands conveyed, for the purpose of realizing money necessary to pay said purchase money; and that, after paying the expenses of the business, the balance of all the profits should be applied for payment of said purchase money as fast as the said profits were ascertained, and that, after the purchase money was paid, all parties were to be equal partners, share equally in the profits, and have an equal interest in the property of the firm, *held*, that the net profits of the partnership, to the extent of the purchase money, including the part which would otherwise belong to the

vendor, were appropriated to the use of the purchasers for the payment of the purchase money and for the reimbursement of any part of the purchase money paid with any other means, and that, upon the failure of the profits to the extent, in whole or in part, of the purchase price, no part of the purchase money was to be remitted by the vendor on account of such failure, unless the deficiency was caused by the vendor's default; that, after the dissolution of the firm, a decree for the specific performance of the contract, at the suit of the vendors against the purchasers, ought to be postponed to the settlement of partnership account. *Hays v. Fish*, 36 Ohio St. 498. See, also, *Hcard v. Pulaski*, 80 Ala. 503.

Where the partnership books do not show the true state of its business the profits may be calculated from the amount of merchandise proved to have been sold by the firm at the rate per cent. profit proved to have been made on said merchandise in that particular business; but testimony of expert witnesses in a similar business is not admissible to prove that profit was made by this firm in their business. *Boire v. McGuin*, 8 Ore. 466.

A particular clause in the articles of copartnership respecting the settlement of quarterly accounts and the manner of ascertaining profits construed. *Emery v. Wilson*, 79 N. Y. 78.

A clause in articles of copartnership relating to the division of

must be applied. (a) With respect to the times of division and *quantum* to be divided at any given time, it is conceived that the majority must govern the minority where no agreement upon the subject has been come to; (b) for these are matters of purely internal regulation, and with respect to such matters a dissentient minority have only one alternative, viz., either to give way to the majority, or, if in a position so to do, to dissolve the partnership.

**\*What is divisible as profit.**—Profit is the excess [\*394] of receipts over expenses; (c) and in winding up a partnership nothing is properly divisible as profit which does not answer this description.<sup>1</sup> But for the purposes of business, and of facilitating annual divisions of profits, a

profits and proceeds arising out of royalties or license fees construed. *Norris v. Rogers*, 107 Ill. 148.

Three persons became partners. The capital stock agreed upon was \$9,000. The partners were each to pay \$3,000. Two of the partners paid in, substantially, their shares of capital stock. The other paid one-half of his stock and agreed to pay the residue at the end of twelve months. The partners purchased real estate, machinery and materials, and engaged in business. The partnership debts and liabilities were paid out of the personal property belonging to the firm. The real estate was left unincumbered of partnership debts. The partners sold the real estate belonging to the firm. *Held*, that the partner who had paid only one-half of his stock was not entitled to share equally with his copartners in the partnership assets. *Smith v. Hazleton*, 34 Ind. 481.

(a) As to the mode of ascertaining profits where a person not a partner is entitled to a share of

them, see *Rishton v. Grissell*, 5 Eq. 326, and 10 Eq. 393; *Geddes v. Wallace*, 2 Bli. 270.

(b) See *Stevens v. South Devon Rail. R. Co.* 9 Ha. 326, and *Corry v. Londonderry, etc. Co.* 29 Beav. 263, as to declaring dividends before paying debts; *Browne v. Monmouthshire, etc. Co.* 13 Beav. 32, as to paying dividends before works are finished.

(c) As to the payment of income tax, see *Last v. London Ass. Corp.* 10 App. Ca. 438; *Lawless v. Sullivan*, 6 App. Ca. 373; and where business is carried on abroad, see *Colquhoun v. Brooks*, 19 Q. B. D. 400; *Erichsen v. Last*, 8 Q. B. D. 414; *Cesena Sulphur Co. v. Nicholson*, 1 Ex. D. 428; *Sully v. A.-G.* 5 H. & N. 711.

<sup>1</sup> Where one partner sells to a firm engaged in working plantations, of which he is a member, a plantation, by turning it over as part of the capital, he becomes a creditor of the firm to the full value of such plantation, and is entitled to payment before the firm can be said to make any profits for

distinction is made between ordinary and extraordinary receipts and expenses; and whilst all extraordinary expenses are frequently defrayed out of capital, and out of money raised by borrowing, the ordinary expenses are defrayed out of the returns of the business; and the profits divisible in any year are ascertained by comparing the ordinary receipts with the ordinary expenses of that year. It is obvious that, unless some such principle as this were had recourse to, there could be no division of profits, even of the most flourishing business, whilst any of its debts

division. *Keaton v. Mayo*, 71 Ga. 649. See, also, *Livingston v. Blanchard*, 130 Mass. 341.

Where parties purchase on joint account, and for speculation, a lot of goods, with the understanding that they shall share equally the profits and losses which may result from the sale thereof, the advances and expenses are to be first paid before there can be any division of the profits. It partakes of the nature of a partnership. *Doane v. Adams*, 15 La. Ann. 350.

Interest on the capital invested is not to be deducted in ascertaining the "net profits," but only losses and expenses of business. *Tutt v. Land*, 50 Ga. 339, 350. See *ante*.

The plaintiffs sublet part of their store to the defendant to carry on a certain business. Afterwards an agreement was entered into whereby the plaintiffs were to assist the defendant in his business, the latter to assume the whole rent, furnish the capital, defray the expenses, and pay the plaintiffs one-fourth of the net profits. *Held*, that, in ascertaining the profits, the defendant was entitled to a credit for loss of stock by fire (*Meserve v. Andrews*, 106 Mass.

419; *Gill v. Geyer*, 15 Ohio St. 399), but not for expenses incurred without the knowledge of the plaintiffs in defending a criminal prosecution for carrying on the business, which did not arise through any act, directly or indirectly, of the plaintiffs. *Meserve v. Andrews*, *supra*.

A partner who has withdrawn assets and invested them in a new enterprise without his copartners' consent is chargeable only with their proportionate share of the profits thereof. *Brown v. Shackelford*, 53 Mo. 122.

Under articles of partnership which stipulated that the cash receipts, after deducting one-half the profits, are to be paid to one partner, and that the other partners are, at the expiration of the partnership, to take their proportion of the outstanding claims as part of the profits, the latter are not required to take the whole of their profits out of the claims. The last clause of the stipulation relates to such part of the profits as are represented by the claims. *Moore v. Thieber*, 31 Ark. 113.

Upon a bill for an account by the administrator against the surviving partner, who has bought the assets, except letters patent



were unpaid and any of its capital sunk. What losses and expenses ought to be treated as ordinary, and therefore payable out of current receipts, and what ought to be treated as extraordinary, and payable legitimately out of capital or money borrowed, is a question on which opinions may often honestly differ; and one which, when open to honest diversity of opinion, a majority of members can lawfully determine. (d) But if the current receipts exceed the current expenses the writer apprehends that the difference can be divided as profit, although the capital may be spent and not be represented by salable assets. (e)<sup>1</sup>

**Cases where dividends have been held not improper.**—Under ordinary circumstances, and in the absence of any agreement to the contrary, moneys earned ought to be treated as profits of the year in which they are received and not as profits of the year in which they are earned. (f)

**\*Exclusion from share of profits.**—As will be seen [\*395] hereafter, in the absence of an express agreement to that effect partners have no right to expel one of their num-

for a product, and uses such patent against the objection of the administrator, the surviving partner is liable for one-half of the profits of the manufacture and sale of such article, less costs and expenses incurred therein by the survivor, and a fair allowance for manufacturer's profits, but the administrator is not entitled to interest, except from the date of filing his bill. *Freeman v. Freeman*, 142 Mass. 98; S. C. 136 id. 260.

(d) See *Gregory v. Patchett*, 33 Beav. 595.

(e) As to the construction of clauses relating to payment of dividends out of profits, see *Davison v. Gillies*, 16 Ch. D. 347, n.; *Dent v. London Tramways Co.* id. 344. As to paying dividends out of capital, *Bloxam v. Metropolitan Rail. Co.* 8

Ch. 337; *Flitcroft's Case*, 21 Ch. D. 519. This subject will be more fully discussed in the volume on Companies.

<sup>1</sup> Partners in a commercial adventure made a statement of the supposed profits before the profits were ascertained, and before payment for the goods purchased for the adventure, and one of the partners, with his share of the profits, purchased real estate. On a bill by a guarantor who had paid the price of the goods the court ordered a resale of the land purchased by the partner to reimburse the guarantor. *Greene v. Ferrie*, 1 Dessau. 164.

(f) See *per Turner, L. J.*, in *Mac-laren v. Stainton*, 3 De G. F. & J. 214. Compare *Browne v. Collins*, 12 Eq. 586.

ber nor to forfeit his share. (g) Neither can they exclude him from the enjoyment of his share of profits. (h)<sup>1</sup> A partner so excluded can compel his copartners to restore him to his rights and account to him accordingly. (i)

(g) *Infra*, book iv, ch, 1, § 1.

(h) *Griffith v. Paget*, 5 Ch. D. 894; *Adley v. The Whitstable Co.* 17 Ves. 315, 19 id. 304, and 1 Mer. 107.

<sup>1</sup>Several persons engaged in a partnership for the purpose of buying lands from Indians, and reselling them, the parties to be interested in the profits in the proportion that they each invested their money in the purchase of land. *Held*, that funds arising from the resale of land in the hands of any of the partners, being the profits of the land resold, was the money of

the company, open to re-investment; and whilst such a fund existed, adequate to the demand, no partner could be considered in default if his proportion of it was sufficient to meet the exigency. Nor could a member of the firm, actively engaged in its business, be excluded from a participation in its benefits for want of funds, without notice. *Patterson v. Ware*, 10 Ala. 444.

(i) *Id.* And see *infra*, ch. 10, under the heads Account and Injunction.

## \*CHAPTER VIII.

[\*396]

### OF THE ACCOUNTS OF PARTNERSHIPS.

In the present chapter it is proposed to consider (1) the mode in which partnership accounts are kept; (2) the duty of keeping and the right of inspecting the accounts of partnerships. The subject of opening settled accounts will be referred to in a subsequent chapter.

#### SECTION I.—OF THE MODE OF KEEPING PARTNERSHIP ACCOUNTS.

**Partnership accounts.**—It is usual among mercantile men to treat all the accounts of a partnership as accounts of the firm, and to deal with the accounts of individual partners as if they were simply debtors or creditors of the firm. The property brought into the concern is credited to the stock account of the firm, and is then distributed through the ledger accounts, and in these ledger accounts the several articles and persons are made debtors to stock for the several items passed into these accounts. Each partner has his own separate account opened with the firm (usually in a private ledger), and is credited with everything he brings into it, and is debited with everything he draws out of it. Upon a rest the net profits are determined, and are divided between the partners in the proper proportions, and the share of each partner is carried to the credit of his own separate account. The partners are creditors of the firm for all its stock, and they are debtors to it for all its deficiencies. When they first bring in their capital the firm is in the private ledger made debtor to each of them for his proportion of capital. Whenever stock is taken, and a surplus appears, that surplus is divided according to

[\*397] the shares, and is carried to the \*accounts of the respective partners. If, instead of a surplus, a deficiency appears, the loss is apportioned in the same way. (a)

Each partner being thus treated like an ordinary creditor and debtor in respect of what he brings in and what he draws out, the balance standing to his credit or to his debit, as the case may be, in the private ledger, shows how his account with the *firm* stands. Upon payment of that balance by the firm to him if the balance is in his favor, or by him to the firm if the balance is against him, his account with the firm is closed and settled.

**Mode of ascertaining partner's share of profit or loss.**

Each partner's share of a profit to be divided or of a loss to be made good is ascertained by a simple rule-of-three calculation. If the partners have agreed to share profits and losses equally the share of each of any particular profit or any particular loss is ascertained by dividing the whole profit or the whole loss, as the case may be, by the number of partners. If, however, the partners share profits and losses in proportion to their respective capitals, then, as the united capitals are to the whole profit or whole loss, so will each partner's share of capital be to his share of such profit or loss.

**Examples.**—In order to illustrate the principle upon which partnership accounts are kept, let it be supposed that A., B. and C. are partners, with a capital of 3,000*l.*, subscribed by them equally; that they share profits and losses in proportion to their respective capitals, and that A. has drawn out 500*l.*, and B. has advanced 100*l.* There are then three cases to be considered.

(a) See Cory on Accounts, ed. 2, p. 71 *et seq.*

*Case 1.—Where there are no profits or losses.*

The accounts will then stand thus: (b)

1. *Partnership Account.*

<i>Dr.</i> to stock.....	£3,000 0 0	<i>Cr.</i> by A.'s sum with-	
to B., for advance....	100 0 0	drawn .....	£500 0 0
		by balance.....	2,600 0 0
	<u>£3,100 0 0</u>		<u>£3,100 0 0</u>

\*2. *A.'s Account.*

[\*398]

<i>Dr.</i> to sum withdrawn.	£500 0 0	<i>Cr.</i> by capital.....	£1,000 0 0
to balance.....	500 0 0		
	<u>£1,000 0 0</u>		<u>£1,000 0 0</u>

3. *B.'s Account.*

<i>Dr.</i>		<i>Cr.</i> by capital.....	£1,000 0 0
to balance.....	£1,100 0 0	by advance .....	100 0 0
	<u>£1,100 0 0</u>		<u>£1,100 0 0</u>

4. *C.'s Account.*

<i>Dr.</i>		<i>Cr.</i> by capital.....	£1,000 0 0
to balance.....	£1,000 0 0		
	<u>£1,000 0 0</u>		<u>£1,000 0 0</u>

5. *Balance Sheet.*

<i>Dr.</i> to balance as above		<i>Cr.</i> by balance due, as	
(from 1).....	£2,600 0 0	above, to A .....	£500 0 0
		“ B .....	1,100 0 0
		“ C .....	1,000 0 0
	<u>£2,600 0 0</u>		<u>£2,600 0 0</u>

(b) In this case no notice is taken of interest. In cases 2 and 3 interest is supposed to be calculated.

*Case 2.— Where there is a profit to be divided.*

The accounts will then stand as under, if the profit is supposed to be 1,000*l.*, and interest at five per cent. is charged on all sums brought in and taken out by each partner, and on his capital.

*1. Partnership Account.*

<i>Dr.</i> to stock.....	£3,000 0 0	<i>Cr.</i> by A.'s sum with-	
to interest on ditto for		drawn, with interest	
one year.....	150 0 0	for one year.....	£525 0 0
to B., for advance,			
with interest for one			
year.....	105 0 0		
to profit.....	1,000 0 0	by balance.....	3,730 0 0
	<u>£4,255 0 0</u>		<u>£4,255 0 0</u>

[\*399]

*\*2. A.'s Account.*

<i>Dr.</i> to sum withdrawn		<i>Cr.</i> by capital.....	£1,000 0 0
with interest for one		by interest on ditto...	50 0 0
year.....	£525 0 0	by one-third share of	
to balance.....	858 6 8	profit.....	333 6 8
	<u>£1,383 6 8</u>		<u>£1,383 6 8</u>

*3. B.'s Account.*

<i>Dr.</i>		<i>Cr.</i> by capital.....	£1,000 0 0
to balance...	£1,483 6 8	by interest on ditto..	50 0 0
		by advance and inter-	
		est thereon .....	105 0 0
		by one-third share of	
		profits .....	333 6 8
	<u>£1,483 6 8</u>		<u>£1,483 6 8</u>

*4. C.'s Account.*

<i>Dr.</i>		<i>Cr.</i> by capital.....	£1,000 0 0
to balance.....	£1,383 6 8	by interest on ditto...	50 0 0
		by one-third share of	
		profits .....	333 6 8
	<u>£1,383 6 8</u>		<u>£1,383 6 8</u>

5. *Balance Sheet.*

<i>Dr.</i> to balance as above		<i>Cr.</i> by balance due as	
(from 1) .....	£3,730 0 0	above to A.....	£858 6 8
		“ B.....	1,488 6 8
		“ C.....	1,383 6 8
	<u>£3,730 0 0</u>		<u>£3,730 0 0</u>

*Case 3.—Where there is a loss to be made good.*

Then if the loss is supposed to be 5,000*l.*, and interest is calculated as in the last example, the accounts will stand thus:

1. *Partnership Account.*

<i>Dr.</i> to stock.....	£3,000 0 0	<i>Cr.</i> by loss.....	£5,000 0 0
to interest on ditto for		by A.'s sum with-	
one year .....	150 0 0	drawn with interest	
to B. for advance with		for one year.....	525 0 0
interest for one year	105 0 0		
to balance .....	<u>2,270 0 0</u>		
	£5,525 0 0		<u>£5,525 0 0</u>

\*2. *A.'s Account.*

[\*400]

<i>Dr.</i> to sum withdrawn		<i>Cr.</i> by capital.....	£1,000 0 0
with interest for		by interest on ditto..	50 0 0
one year .....	£525 0 0	by balance....	1,141 13 4
to one-third share of			
loss .....	<u>1,666 13 4</u>		
	£2,191 13 4		<u>£2,191 13 4</u>

3. *B.'s Account.*

<i>Dr.</i> to one-third share		<i>Cr.</i> by capital.....	£1,000 0 0
of loss.....	£1,666 13 4	by interest on ditto..	50 0 0
		by advance with in-	
		terest .....	105 0 0
		by balance.....	511 13 4
	<u>£1,666 13 4</u>		<u>£1,666 13 4</u>

4. *C.'s Account.*

<i>Dr.</i> to one-third share		<i>Cr.</i> by capital.....	£1,000 0 0
of loss .....	£1,666 13 4	by interest on ditto..	50 0 0
		by balance .....	616 13 4
	<u>£1,666 13 4</u>		<u>£1,666 13 4</u>

5. *Balance Sheet.*

<i>Dr.</i> to balance due as		<i>Cr.</i> by balance as above	
above from A.....	£1,141 13 4	(from 1) .....	£2,270 0 0
“ B.....	511 13 4		
“ C.....	616 13 4		
	<u>£2,270 0 0</u>		<u>£2,270 0 0</u>

**Effect of each partner being his own creditor or debtor.**—The balances ultimately arrived at in the foregoing accounts are the sums payable—in the first two cases by the firm to the individual partners, and in the last case to the firm by them—in order to wind up the affairs of the firm. But it must not be imagined that the balances in question are debts owing to each partner by his copartners. The balances are owing by and to the *firm*, and each partner being included in the firm is, to the extent of his share, his own debtor and his own creditor.

**In what sense a partner is debtor to or creditor of the firm.**—Accountants are quite right in debiting each partner in his account with the firm with the whole of whatever he draws out, and in crediting him with the whole [\*401] of whatever he brings in.<sup>1</sup> \* “But,” as observed by Lord Cottenham, “though these terms ‘debtor’ and ‘creditor’ are so used, and sufficiently explain what is meant by the use of them, nothing can be more inconsistent with the known law of partnership than to consider the situation of either party as in any degree resembling the

<sup>1</sup> Advances to the firm by one of its members do not constitute debts of the firm, but merely matters of account between the partners to be settled in the final adjustment of the partnership. *Wilson v. Soper*, 13 B. Mon. 411.



situation of those whose appellation has been so borrowed. The supposed creditor has no means of obtaining payment of his debt; and the supposed debtor is liable to no proceedings either at law or in equity — assuming always that no separate security has been taken or given. (c) The supposed creditor's debt is due from the firm of which he is a partner; and the supposed debtor owes the money to himself in common with his partners." (d)

**Ultimate adjustment of accounts.**—The final adjustment of a partnership account frequently gives rise to questions of some difficulty. One is whether the principles on which profits and losses have been previously sustained are to be adhered to, or whether they are to be more or less departed from; another is whether, on a final adjustment of accounts, anything can be regarded as profit or loss until the capitals of the partners have been repaid or exhausted, as the case may be. In order to solve these and similar questions regard must always be had to the terms of the partnership articles; but an express agreement with reference to the taking of accounts may be, and [\*402] frequently is, only applicable to the case of a con-

(c) The remedies available by one partner against another will be examined hereafter. See, also, *ante*, p. 110.

(d) *Richardson v. The Bank of England*, 4 M. & Cr. 171-2. Suppose that a firm consists of three partners, A., B. and C.; that their respective capitals are  $a$ ,  $b$ ,  $c$ , and that they share profits and losses in proportion to those capitals. Then  $a+b+c$  will be the joint capital of the three partners; and if  $M$  represents the amount of loss or gain to be shared, A.'s share of such loss or gain will be  $\frac{M}{a+b+c} \times a$ ; B.'s share will be  $\frac{M}{a+b+c} \times b$ ; and C.'s

share will be  $\frac{M}{a+b+c} \times c$ . Upon

precisely the same principle, if the firm is indebted to A. in a sum  $a'$ , A. will owe himself in respect of

this debt  $\frac{a'}{a+b+c} + a$ ; B. will owe

A.  $\frac{a'}{a+b+c} \times b$ ; and C. will owe

A.  $\frac{a'}{a+b+c} \times c$ . So if B. is in-

debted to the firm in a sum  $b'$ ; B. will owe himself in respect of this

debt  $\frac{b'}{a+b+c} \times b$ ; he will owe

A.  $\frac{b'}{a+b+c} \times a$ ; and will owe C.

$\frac{b'}{a+b+c} \times c$ .

tinuing partnership, and may not be intended to be observed on a final dissolution of the firm, or even on the retirement of one of its members. (e) A similar observation applies to the mode in which the partners themselves have been in the habit of keeping their accounts: that which has been done for the purpose of sharing annual profits or losses is by no means necessarily a precedent to be followed when a partnership account has to be finally closed. (f) Bearing these observations in mind, the following rules are submitted as those which ought to be followed upon a final settlement of partnership accounts, where there is nothing else to serve as a guide.

**Rules to be observed.**—In adjusting the accounts of partners, losses ought to be paid first out of assets excluding capital, next out of capital, and lastly by having recourse to the partners individually; (g)<sup>1</sup> and the assets of the partnership should be applied as follows:

1. In paying the debts and liabilities of the firm to non-partners;

(e) See, for examples, *Lawes v. Lawes*, 9 Ch. D. 98; *London India Rubber Co.* 5 Eq. 519; *Blisset v. Daniel*, 10 Ha. 493; *Wade v. Jenkins*, 2 Giff. 509; *Wood v. Scoles*, 1 Ch. 369; and as to interest, *ante*, p. 390, note (o). Compare *Re Barber*, 5 Ch. 687.

(f) For example, the value of good-will seldom, if ever, appears in annual accounts. See *Stewart v. Gladstone*, 10 Ch. D. 626, 659; *Wade v. Jenkins*, 2 Giff. 509.

(g) See *Binney v. Mutrie*, 12 App. Ca. 160; *Crawshay v. Collins*, 2 Russ. 347, and *Richardson v. Bank of England*, 4 M. & Cr. 173.

<sup>1</sup> By a partnership agreement A. was to furnish \$20,000 and B. was to manage the business, keep the stock up to the original value, and, on dissolution, to deliver up to A.

the remaining stock to the value of \$20,000, "losses by bad debts, decay of goods and inevitable accidents excepted." The partnership was to continue five years unless dissolved by B.'s death. The profits, after paying rent, taxes and necessary expenses, were to be equally shared. *Held*, that the losses by bad debts, etc., were to be deducted from the profits and not from the stock of \$20,000, so long as there was a surplus over that amount. *Leach v. Leach*, 18 Pick. 68.

Defendants owned and published a "Shipping Register." They agreed with certain insurance inspectors to share equally with such inspectors fifty per cent. of the profits of the "Register," in consideration of which the inspectors were to furnish information for the

2. In paying to each partner ratably what is due from the firm to him for advances as distinguished from capital; (*h*)

"Register." Upon the execution of this agreement plaintiff and defendants formed an association styled the "American Lloyds." An account having been had, plaintiff sued for his share of the fifty per cent. profits. Defendants pleaded non-performance by plaintiff, on a full payment by defendant on a counter-claim for damages caused by plaintiff's alleged confederacy with the owners of a rival publication. Upon the trial, among the facts adduced, the defendants showed that, by reason of alleged unskillfulness or negligence, a claim was made against the association which might exhaust the entire amount of its assets. *Held*, that it is undoubtedly the rule that the property of a partnership shall be first applied to the payment of the debts of the concern before there can be any division of the assets. This rule applies even though there is a person to be compensated for services out of the profits. But the defendants cannot insist upon the application of this rule to the present case, because: 1. The claim is not admitted by the defendants to be a valid claim, but they deny liability therefor. 2. The defendants have rendered their account without noticing such claim, and they had previously acted on accounts so rendered as fixing the amount of compensation. 3. No such defense is set up in the answer, and it is not therefore avail-

able in the present action. *Luce v. Hartshorn*, 7 Lans. 331.

Under a clause in articles providing that all profits should be divided equally and all losses happening to the firm, whether from bad debts, depreciation of goods or any other cause or accident, and all expenses of the business, are to be borne by the parties equally, the losses should be thus divided without regard to the amount of capital contributed by each of the partners. *Jones v. Butler*, 87 N. Y. 613; *S. C.* 23 Hun (N. Y.), 367.

For a case where, though by the agreement the parties were to furnish the same amount of capital, and losses were to be equally divided, the plaintiff is not chargeable for any sum beyond his investment, see *Knapp v. Edwards*, 57 Wis. 191.

An agreement was made between C. and Y., copartners, that the partnership existing between them should be dissolved; that C. should take all the real estate and personal property of the firm at a certain value, nothing being said about the taxes then existing against the property; that C. should pay the indebtedness of the firm included in a certain list; and that the liability of the firm not included in the list should be paid out of money collected from the outstanding debts due the firm. *Held*, that the taxes should be paid out of the co-

(*h*) These come before costs of winding up. See *Potter v. Jackson*, 13 Ch. D. 845; *Austin v. Jackson*, 11 id. 942, *note*.

3. In paying to each partner ratably what is due from the firm to him in respect of capital;

4. The ultimate residue, if any, will then be divisible as profit between the partners in equal shares, unless the contrary can be shown.

If the assets are not sufficient to pay the debts and liabilities to non-partners, the partners must treat the difference as a loss and make it up by contributions *inter se*. If

the assets are more than sufficient to pay the debts [\*403] and liabilities of the \*partnership to non-partners,

but are not sufficient to repay the partners their respective advances, the amount of unpaid advances ought, it is conceived, to be treated as a loss, to be met like other losses. In such a case the advances ought to be treated as a debt of the firm, but payable to one of the partners instead of to a stranger. (i) If, after paying all the debts and liabilities of the firm and the advances of the partners, there is still a surplus, but not sufficient to pay each partner his capital, the balances of capitals remaining unpaid must be treated as so many losses, to be met like other losses. (k)<sup>1</sup>

partnership funds. *Young v. Clute*, 12 Nev. 31.

(i) See *Wood v. Scoles*, 1 Ch. 369.

(k) See the next two notes.

<sup>1</sup>Two persons (H. and C.), both of whom then resided in the state of New York, entered into written articles of copartnership, by which they agreed to transact as partners at Keokuk, Iowa, the wholesale and retail dry goods business. H. and C. severally agreed to contribute, and did contribute, \$2,000 of capital each in cash. H. agreed to devote himself diligently at Keokuk to the said partnership business, except when the purchasing of goods or other necessary business of the firm required

him to be absent from Keokuk. C. agreed to attend to that part of the business which could be conducted in the city of New York, as far as he was able, without interfering in any way with his duties there as clerk of any firm by whom he might be employed. It was stipulated that H. should be entitled to receive and be paid "three-fourths parts of the profits of said partnership," and the said C. "one-fourth part." The agreement did not in terms make any provision in respect to losses. No profits were made, but the losses absorbed \$3,120.20 of the capital contributed. *Held*, that neither party had any claim against the other for the

**Equality of loss and inequality of capital.**—The only case which practically gives rise to difficulty is when partners have advanced, or agreed to advance, unequal capitals and to share profits and losses equally. If nothing more than this is agreed a deficiency of capital must be treated like any other loss, and the assets remaining after payment of all debts and advances must be distributed amongst the partners so as to make each partner's loss of capital equal; and if the assets are not sufficient there must be such a contribution amongst the partners, or some of them, as to put all on an equality. (*l*)<sup>1</sup> But, if the true meaning

money lost, and that the \$879.80 remaining of the capital should be equally divided between the partners. *Held*, also, that by a just construction of the articles it was agreed thereby that H. should receive one-half profits for his extra services if profits were made; and if none were made he was not to be compensated therefor, and that losses were to be equally borne. *Hasbrouck v. Childs*, 3 Bosw. 105.

It was expressly agreed that C. and W., two out of four partners, were to receive interest on the capital by them respectively contributed. The firm was dissolved by mutual consent, and W. closed up the firm's business, which resulted in a loss. *Held*, on bill in equity by W. against the other partners, that the capital constituted a debt of the partnership, to pay which all the partners were bound to contribute equally, and that, one of them being insolvent, the others were bound to contribute equally to make up the loss. *Whitcomb v. Converse*, 119 Mass. 38.

When, under a partnership contract, the proceeds of the enterprise constitute the primary fund from

which a partner is to be reimbursed for excess in advances, and the partnership is, by consent, terminated before they are sufficient, the partner who has advanced in excess of the amount due from him may maintain his action for the excess. *Merriwether v. Hardeman*, 51 Tex. 436.

(*l*) *Binney v. Mutrie*, 12 App. Ca. 160. See the form of order there. See, also, *Nowell v. Nowell*, 7 Eq. 538; *Anglesea Colliery Co.* 2 Eq. 379, and 1 Ch. 555; *Ex parte Maude*, 6 Ch. 51. Compare *Holyford Mining Co.*, 1r. Rep. 3 Eq. 208.

<sup>1</sup> See *Taylor v. Coffing*, 18 Ill. 422; *Maley v. Brine*, 120 Mass. 324.

Where, by articles of copartnership, A. contributes money, and B. his personal services, in the event that there are no profits, and the capital furnished by A. is lost, *held*, that B. cannot, in the absence of any agreement to the contrary, be called upon to bear any proportion of the loss of the capital. *Cameron v. Watson*, 10 Rich. Eq. 64; *Early v. Durborow*, 1 Pa. Leg. Gaz. Rep. 127.

C., one of four partners, was to

of the partners is that all debts shall be paid out of the assets, and that any surplus assets remaining after payment of debts shall be divided between the partners in proportion to their interests therein or to their capitals, effect must be given to such an agreement, and those partners who agree to bring in most capital will lose most. (*m*)

[\*404] \*SECTION II.—OF THE DUTY TO KEEP AND THE RIGHT TO INSPECT PARTNERSHIP ACCOUNTS.

**Duty to keep proper accounts and to allow them to be examined.**—It is one of the clearest rights of every partner to have accurate accounts kept of all money transactions relating to the business of the partnership, and to have

contribute to the business \$25,000, and “such time as he may be able to give,” receiving interest on the \$25,000; W., another partner, \$50,000, and all his time, receiving interest on the \$50,000, and B. and A., the two others, to contribute of their time. Each partner was to receive one-fourth of the net profits. The business resulted in a loss, and B. became insolvent. *Held*, that the capital constituted a debt of the partnership to which all were bound to contribute equally, and that the loss was to be borne equally by C., W. and A. *Whitcomb v. Converse*, 119 Mass. 38.

Articles of copartnership between S. T. and two others stipulated that the latter should furnish \$6,000, *i. e.*, each \$3,000, the profits and losses to be divided equally among the three copartners, share and share alike. *Held*, 1, that as the consideration of S. T.’s being

entitled to one-third of the profits did not appear, it was a matter of fact for the jury to determine, on oral evidence, of what it consisted, whether it was merely that he was to contribute one-third of the labor, or was to furnish skill, credit, attention and services in carrying on the business.

2. If the two, under such agreement, besides capital, were to furnish their skill and services, the question whether, if a loss of capital occurred in the business, S. T. is not bound to pay one-third of the deficiency, is also a matter of fact for the jury, and it is error for the court to decide it.

*Quære*, whether, on the face of such agreement merely, each partner is not in case of a loss of capital bound to contribute his proportion to make it good to the others. *Yoke v. Barnet*, 3 W. & S. 81.

(*m*) *Wood v. Scoles*, 1 Ch. 369, is an instance of such a case.

free access to all its books and accounts. (*n*)<sup>1</sup> So important is it to every partnership that proper accounts shall be kept and be accessible to all the partners, that, whenever any written articles of partnership are entered into, clauses are inserted for the purpose of removing whatever doubts there might otherwise be upon the subject. The usual nature and the general effect of such clauses will be adverted to in the next chapter, and the right to discovery in an action will also be discussed hereafter. In the present place it will be sufficient to observe that it is the duty of every partner to keep precise accounts and to have them always ready for inspection. (*o*) One partner has no right to keep the partnership books in his own exclusive custody or to remove them from the place of business of the partnership. (*p*) In the absence of an express agreement to the contrary, every partner has a right, without the permission of his copartners, to inspect, examine and make extracts from all the books of the firm; (*q*) and no partner can deprive his copartners of this right by keeping the partnership accounts in a private book of his own containing other matters with which they have no concern. (*r*) At the same time, if a person entitled to a share of the profits of a business expressly agrees that he will accept

(*n*) See *per* Lord Eldon in *Rowe v. Wood*, 2 Jac. & W. 558-9, and in *Goodman v. Whitcomb*, 1 id. 593.

<sup>1</sup> See *infra*, note.

A partner drawing partnership funds for use in the firm business should keep a full and accurate account of the disposition of such money, and is chargeable with all sums not so accounted for. General testimony to the fact that they were used for the benefit of the partnership is not a sufficient accounting. *Webb v. Fordyce*, 55 Ia. 11.

(*o*) *Rowe v. Wood*, 2 Jac. & W.

558. See, too, *Goodman v. Whitcomb*, 1 id. 593, and 3 V. & B. 36.

(*p*) See *Taylor v. Davis*, 3 Beav. 388, note; *Greatrex v. Greatrex*, 1 De G. & S. 692; *Charlton v. Poulter*, 19 Ves. 148, note.

(*q*) See *Stuart v. Lord Bute*, 12 Sim. 460; *Taylor v. Rundell*, 1 Ph. 222, and 1 Y. & C. C. C. 128. This right was not enforceable at law even in an action by one partner against another. *Ward v. Apprice*, 6 Mod. 264.

(*r*) See *Freeman v. Fairlie*, 3 Mer. 43; *Toulmin v. Copland*, 3 Y. & C. Ex. 655.

the balance sheets prepared by others as correct, and will not investigate the books or accounts himself, he will be bound by that agreement. (s)

[\*405] **\*Effect of keeping no books or of destroying them.**— If no books of account at all are kept, or if they are so kept as to be unintelligible, or if they are destroyed or wrongfully withheld, and an account is directed by a court, every presumption will be made against those to whose negligence or misconduct the non-production of proper accounts is due. (t)<sup>1</sup> If all the persons interested in

(s) See *Turney v. Bayley*, 4 De G. J. & S. 332.

(t) See *Walmsley v. Walmsley*, 3 Jo. & Lat. 556; *Gray v. Haigh*, 20 Beav. 219.

<sup>1</sup> *Pierce v. Scott*, 37 Ark. 308; *Bevans v. Sullivan*, 4 Gill, 383; *Gage v. Parmelee*, 87 Ill. 329; *Diamond v. Henderson*, 47 Wis. 172; *Pomeroy v. Benton*, 77 Mo. 64; *Oteri v. Oteri*, 38 La. Ann. 403; S. C. 37 La. Ann. 74. See, also, *Evans v. Montgomery*, 50 Ia. 325; *Joplin v. Cordrey*, 5 So. W. Rep. (Ky.) 397.

The rule *omnia præsumuntur contra spoliatores* is for wrongdoers, and should not be applied to a case where the failure to perform a duty is due solely to incapacity. So held in an action for an accounting by one partner against another who had covenanted to keep correct books of account, but had failed to do so because incompetent, the plaintiff having known such incompetency, and having condoned or waived it. *Knapp v. Edwards*, 57 Wis. 191.

Where one of three partners agreed with the others that he would manage the whole business and keep the books, he is responsible on settlement of accounts for all the merchandise bought for the

firm; and where the books do not show what disposition was made of a portion of it he will be charged with the deficiency. *Hower's Appeal*, 38 Leg. Intel. 406.

Where partners have been so negligent as to lose the evidence of the partnership, and have kept their accounts in so confused a way that the court cannot see what decree will do justice between them, a bill for an account will be dismissed. *Rick v. Neitzy*, 1 Mackey (D. C.), 21; *Slater v. Arnett*, 81 Va. 432.

Where the partnership books were lost, and there was on the record all the evidence which, apart from the books, was available, an order for an account was refused because it would have been impossible upon the bill, answers and testimony to state any account. *Davidson v. Wilson*, 3 Del. Ch. 307.

Under the peculiar circumstances of this case the account was correctly stated from the cash book and ledger, the other books having been sold for waste paper. *Sangston v. Hack*, 52 Md. 173.

In an action for a dissolution and for an accounting, where the evidence shows that the books had been so improperly kept by defend-



the account are *in pari delicto* this rule cannot be applied; but it is the duty of continuing or surviving partners so to

ant that it was impossible to tell anything about the state of the partnership from said books, the attorney stipulated that experts should be employed by a referee to reduce the books to an intelligible shape, and the experts made out a new set of books from the old books. *Held*, that such new books were properly admitted in evidence in connection with report of the referee. *Roberts v. Eldred*, 15 Pac. Rep. (Cal.) 16.

The powers of the partners are co-ordinate, whether the partnership is in active operation or subsists only for the purpose of winding up the affairs thereof, and it is the duty of each partner to keep precise accounts of all his own transactions for the firm, and to have them at all times ready for inspection. *Hall v. Clagett*, 48 Md. 224. See, also, *Beacham v. Eckford*, 2 Sandf. Ch. 116.

If there has been a total failure to do this it affords a good reason for a court of equity to decline to supply them without a sufficient reason or excuse for the omission. A court of equity will not grope its way in utter darkness and undertake to create and establish a claim upon mere contingencies, or the preponderance of mere possibilities or probabilities. There is no duty devolving on it to assume the impracticable task of adjusting the relative rights of partners when the proof is utterly deficient and inconclusive. *Hall v. Clagett*, 48 Md. 224. See, also, *Bevans v. Sullivan*, 4 Gill, 382.

The presumption of law arising

from the non-production or destruction of evidence by one party cannot relieve the opposite party from the burden of proving his case. It will justify the admission of secondary evidence, and, when the evidence is conflicting, then the presumption will have its full operation and weight. *Gage v. Parmelee*, *supra*.

As to what extent the rule *in odium spoliatoris* will apply to a partner's partial destruction of records of his outside ventures on the hearing of a bill for an account, see *Pomeroy v. Benton*, 57 Mo. 531.

On a bill by a fraudulent partner for an account the master may charge him on any evidence which is competent or admissible as proof of the item; he cannot hold the injured partner to such degree of proof as would justify a charge, under ordinary circumstances, against a customer or partner; there must, however, be some proof. *Askew v. Odenheimer*, *Baldw.* 380.

In *Dimond v. Henderson*, *supra*, it appearing that goods sold by weight or measure were taken from the store to be used in plaintiff's family without having been weighed or measured, and that the accounts as shown by the books could therefore not be relied upon as accurate in that respect, the referee for trial did not err in resorting to other sources for information in order to get at the real amount and value of goods so used.

A member of a firm, whose duty

keep the accounts of the firm as at any time to show the position of the firm when a change among its members occurred. (*u*)

it is to keep the accounts, and who claims that he has omitted to enter credits to which he is entitled, will be required to make the most satisfactory proof of the mistakes he asks to have corrected. *Van Ness v. Van Ness*, 32 N. J. Eq. 669.

The accounts of the partners with the firm should not be blended with the individual accounts between the partners themselves. *Honore v. Colmesnil*, 1 J. J. Marsh. 517.

Where a mother and son verbally contract a planting partnership, and live together a long time, until her death, it will not be presumed that they kept regular accounts, nor will his failure to do so make him or his heirs liable. *Theall v. Lacey*, 5 La. Ann. 548.

When a partner takes possession of all the stock, books, etc., and in a settlement furnishes no evidence of the insolvency of the debtors or unsuccessful diligence in collecting the claims, they will be regarded as cash in his hands. *Bush v. Guion*, 6 La. Ann. 798.

"Courts of equity adopt very enlarged views in regard to the rights and duties of agents; and in all cases where the duty of keeping regular accounts and vouchers is imposed upon them they will take care that the omission to do so shall not be used as a means of escaping responsibility or of obtaining undue recompense. If, therefore, an agent does not, under such circumstances, keep regular accounts and vouchers, he will not be allowed

the compensation which otherwise would belong to his agency. Upon similar grounds, as an agent is bound to keep the property of his principal distinct from his own, if he mixes it up with his own, the whole will be taken, both at law and in equity, to be the property of the principal, until the agent puts the subject-matter under such circumstances that it may be distinguished as satisfactorily as it might have been before the unauthorized mixture on his part. In other words, the agent is put to the necessity of showing clearly what part of the property belongs to him: and so far as he is unable to do this it is treated as the property of his principal. Courts of equity do not in these cases proceed upon the notion that strict justice is done between the parties, but upon the ground that it is the only justice that can be done, and that it would be inequitable to suffer the fraud or negligence of the agent to prejudice the rights of his principal." *Story on Equity Jurisprudence*, sec. 468. Every word of the above is applicable to the case of a partner acting as the agent of the firm. *Kelly v. Greenleaf*, 3 Story, 105.

(*u*) See *Ex parte Toulmin*, 1 Mer. 598, note; *Toulmin v. Copland*, 3 Y. & C. Ex. 655; and as to losing all right to interest by keeping the accounts improperly, see *Boddam v. Ryley*, 1 Bro. C. C. 239, and 2 id. 2; and 4 Bro. P. C. 561, noticed *ante*, p. 392.

## \*CHAPTER IX.

[\*406]

### OF PARTNERSHIP ARTICLES.

#### SECTION I.—GENERAL OBSERVATIONS.

The rights and obligations of partners *inter se* are generally, to a certain extent, regulated by special agreement, the true meaning of which is to be ascertained by the ordinary rules of construction. (a)<sup>1</sup>

(a) See Chapter X of Story on Part.; Collyer on Part. 137, etc. See, also, the head Partnership in Jarman and Bythewood's Conveyancing and Davidson's Conveyancing.

<sup>1</sup>See Jackson v. Crapp, 32 Ind. 422; Bird v. Hamilton, Walk. Ch. 361.

Partners may make any agreement they think proper in the management of their joint affairs. Hall v. Sannoner, 44 Ark. 34.

An agreement between two firms for the formation of a partnership in the cattle business, held to be inoperative until signed by all the parties to the agreement; and held also that those who signed the agreement could not bind those who did not sign it. Merchants' Bank v. Thompson, 3 Ont. 541. See, also, Tweed v. Lowe, 1 Ariz. 488.

A clause in articles of copartnership whereby one partner guarantees to another certain profits does

not affect other partners. McIntire's Appeal, 10 Cent. Rep. (Pa.) 742; Nellis' Appeal, 10 Cent. Rep. (Pa.) 744; S. C. 11 Atl. Rep. 786.

Tacit understanding among the partners contravening subsisting agreement under which the firm was formed, held inadmissible to modify and impeach its terms. Thomas v. Lines, 83 N. C. 191.

In determining whether a contract constitutes the parties thereto partners, the whole contract must be construed together and the intention of the parties thereto must prevail. If the parties did not intend to become partners then they are not partners as between themselves. Cleveland v. Anderson, 2 Tex. App. (Civ.) 138.

W. made a parol contract of copartnership with defendants, but when the articles were prepared W.'s son was, at his request, permitted to sign them on his assurance that W. was to remain the real party to the agreement, his

In considering the effect, however, of partnership articles, the following principles are to be borne in mind:

**Partnership articles are not intended to define all the rights and duties of partners.**— 1. In the first place, partnership articles are not intended to define, and are not construed as defining, *all* the rights and obligations of the partners *inter se*. A great deal is left to be understood.<sup>1</sup>

son's name being used only to conceal W.'s association with the firm from public knowledge. The conditions of the parol contract were fully performed and the son's connection with the firm was treated as a nullity. *Held*, that W. was liable as a partner. *Watson v. Lovelace*, 49 Ia. 558.

When the terms of a partnership have been reduced to writing the written articles are presumed to contain all the conditions of the partnership. *Boardman v. Close*, 44 Iowa, 428. See, however, *Adams' Appeal*, 15 Weekly Not. Cas. 230; *Plano Mfg. Co. v. Frawley*, 32 N. W. Rep. 768.

Where a written copartnership agreement is doubtful the subsequent conduct of the partners under it is admissible in aid of the construction of the agreement on the question of intent. *Beacham v. Eckford*, 2 Sandf. Ch. 116. See, also, *Southmayd's Appeal*, 6 Cent. Rep. 555.

An agreement to sell, only as an auxiliary to the higher object of forming a partnership, subjects the property to the terms of the partnership and the intention of the partners, as evidenced by the double contract of sale and partnership. *Thompson v. Mylne*, 6 La. Ann. 80.

Upon a suit to dissolve a partnership and for an accounting, when

it appears that the articles do not express the intent of the parties, they may be amended in accordance with the facts and a decree directed accordingly. *Bowker v. Gleason*, 6 Cent. R. 315; S. C. 7 Atl. R. 885. See, also, *Macdonald v. Worthington*, 7 U. C. App. 531; S. C. 18 Can. L. J. (N. S.) 385.

Articles of copartnership drawn in Quebec construed to withdraw the plant from the operation of the law of Quebec, its ownership being expressly provided for by the instrument. *Macdonald v. Worthington*, 7 U. C. App. 531; S. C. 18 Can. L. J. (N. S.) 385.

Recitals or stipulations in articles of copartnership as to the special powers or duties of partners, not bearing on the execution of a note alleged to be a partnership note, are not admissible in an action thereon. *Guice v. Thornton*, 76 Ala. 466.

A contract for partnership executed on Sunday held void. *Durant v. Rhener*, 26 Minn. 362.

<sup>1</sup> Mining partnerships, where there are no partnership articles, are governed by the law of ordinary partnerships, except so far as the general usage of persons engaged in similar pursuits or the established practice of the particular company has established a different rule — the only difference generally existing being such as flow from the fact that in such partner-

The maxim *expressum facit cessare tacitum* naturally applies to partnership articles as to other agreements; but the rights and obligations of partners, so far as they are not expressly declared, are determined by general principles, which are always applicable where not clearly excluded. In the language of Lord Langdale in *Smith v. Jeyes*: (b)

“The transactions of partners with each other cannot be considered merely with reference to the express contract between them. The duties and obligations arising from the relation between the parties are regulated by the express contract between them, so far as the express contract extends and continues in force; but if the express contract, or so much of it as continues in force, does not reach to all those duties and obligations, they are implied and enforced by the law; and it is often matter to be collected and inferred from the conduct and practice of the parties whether they have held themselves, or ought or ought not to be held, bound by the particular \*provisions contained in their express agreement. When it is insisted that the conduct of one partner entitles the other to a dissolution, we must consider not merely the specific terms of the express contract, but also the duties and obligations which are implied in every partnership contract.” (c)

**Articles to be construed with reference to the objects of the partners.**—2. The attainment of the objects which the partners have declared they had in view is always regarded as of the first importance. All the provisions of the articles are to be construed so as to advance and not to defeat those objects; and however general the language of partnership articles may be, they will be construed with reference to the end designed, and, if necessary, receive a restrictive interpretation accordingly. (d) This rule is of especial importance in considering the limits of general powers conferred on committees, directors and others. For example, in *Chapple v. Cadell*, (e) the proprietors of a news-

ships there is no *delectus personæ*. maxim *expressio unius est exclusio alterius*.  
*Jones v. Clark*, 42 Cal. 180. See  
*post*.

(b) 4 Beav. 505. See, too, *Nelson* Ha. 522.  
*v. Bealby*, 30 Beav. 472, and *Browning v. Browning*, 31 Beav. 316, as (d) See Coll. on Part. 137.  
 to the non-application of the (e) Jac. 537.

paper intrusted the management of the paper to a committee of five, and gave them power to call general meetings, and agreed that the resolutions of the majority present at such meetings should be binding on all the proprietors. A meeting was convened, and the majority present resolved that the paper and the shares of all the proprietors in it should be sold by auction. But it was held that the majority had no power to sell the shares of a dissentient and protesting minority.

Other illustrations of the same principle will be found in book III, chapter 2, section 3, which treats of the powers of majorities.

Conformably with the same rule:

**Articles to be construed so as to defeat fraud.**—3. Any provision, however worded, will, if possible, be construed so as to defeat any attempt by one partner to avail himself of it for the purpose of defrauding his copartner.<sup>1</sup> Thus it is very common for partners to agree that half-yearly accounts shall be made out and signed, and not be afterwards disputed; but, notwithstanding such a clause, if one partner knowingly makes out a false account, and his copartners sign it upon the faith that it is correct, they will not be bound by it. (f) Again, it is by no means unusual for partners to agree that yearly accounts shall be taken, and that, in the case of the death of a partner, his representatives shall be paid his share \*as appearing in the last account, with interest instead of subsequent profits; but if the partners do not for several years make out any accounts, and then one of them dies, the survivors are not entitled to act on the letter of the agreement, and pay only the amount which in the last account was car-

<sup>1</sup> An agreement between partners to keep their partnership a secret and maintain a fictitious competition, for the purpose of deceiving the public, would be illegal and void; but such a purpose will not be imputed, by construction, to partnership articles unless clearly evinced. *Fairbank v. Leary*, 40 Wis. 637. (f) See *Oldaker v. Lavender*, 6 Sim. 239.

ried to the credit of the deceased, with interest on such amount. (g)

**The taking of unfair advantages.**—4. Every power conferred by the articles on any individual partner, or on any number of partners, is deemed to be conferred with a view to the benefit of the whole concern; and an abuse of such power, by an exercise of it, warranted perhaps by the words conferring it, but not by the truth and honor of the articles, will not be countenanced. Thus, in a case which has been already frequently referred to, (h) a power to expel any partner was vested in the holders of two-thirds of the shares in the firm; but it was held that, although this power was so framed that it might be exercised without any reason being assigned, it could not be put in force for the unfair purpose of obtaining the share of the expelled partner at less than its value.

**Provisions may be waived by tacit agreement.**—5. Any article, however express, is capable of being abandoned by the consent of *all* the partners; and this consent may be evidenced, not only by express words, but by conduct. (i)<sup>1</sup>

The maxim *modus et conventio vincunt legem* is especially applicable to cases of this description.<sup>2</sup> In the language of Lord Eldon:

“In ordinary partnerships nothing is more clear than this, that, although partners enter into a written agreement, stating the terms upon which the joint concern is to be carried on, yet if there be a long course

(g) *Pettyt v. Janeson*, 6 Madd. 4 Ala. 79; *McCall v. Moss*, 112 Ill. 146. 493; *Hall v. Sannoner*, 44 Ark. 34.

(h) *Blisset v. Daniel*, 10 Ha. 493. A custom between partners that See, also, *Wood v. Woad*, L. R. 9 Ex. 190. either one may draw out of the funds of the partnership more in any one year than the other, if long continued, may be ingrafted upon the written contract of partnership. *Scudder v. Ames*, 89 Mo. 496.

(i) This rule appears to be of comparatively modern date; it was not acted on in *Smith v. The Duke of Chandos*, Barn. 419.

<sup>1</sup> See *Boisgerand v. Wall*, 1 Sm. & M. Ch. 404; *Robbins v. Laswell*, 27 Ill. 365; *McGraw v. Pulling*, 1 Freem. Ch. 357; *Boyd v. Mynatt*,  
<sup>2</sup> In a secret partnership for carrying on the business of planting it is competent to prove the usages

of dealing, or a course of dealing not long, but still so long as to demonstrate that they have all agreed to change the terms of the original written agreement, they may be held to have changed those terms by conduct. For instance, if in a common partnership the parties agree that no one of them shall draw or accept bills of exchange in his own name without the concurrence of all the others, yet, if they afterwards slide into a habit of permitting one of them to draw or accept [\*409] bills without the concurrence of the others, this \*court will hold that they have varied the terms of the original agreement in that respect." (*l*)

**Examples.**—This principle was acted on by Lord Eldon in a case where the partners had agreed that annual accounts should be taken, and that in case of the death of a partner his representatives should be paid an allowance instead of profits; for it appeared that for some years no accounts had been taken, and that the partners had engaged in transactions of such a nature that it would have been unfair to have applied the original agreement. (*l*) So a practice treating losses as bad when discovered so to be was held to apply as between the executors of a deceased partner and the surviving partners, although the effect was to give the executors much more than they would other-

and customs of that business for the purpose of showing that the contract on which the secret partner is sought to be charged was sanctioned by those usages and customs. *Lea v. Guice*, 21 Miss. 656.

Usage may make an incidental business so far the regular business of a partnership as to make all the partners in a firm bound by the contract of one in such incidental business. As, for example, the usage among the boatmen on a certain river to undertake to sell, as well as to carry, cotton may make a firm engaged in the carrying trade responsible for the selling and bringing back the proceeds, as well as carrying cotton, upon a

contract made between the owner of the cotton and one of the firm of boatmen. *Galloway v. Hughes*, 1 Bailey, 553.

(*k*) *Const v. Harris*, T. & R. 523. See, also, *Coventry v. Barclay*, 33 Beav. 1, and on app. 3 De G. J. & Sm. 320; *Pilling v. Pilling*, 3 De G. J. & Sm. 162; *England v. Curling*, 8 Beav. 133 and 137; *Somes v. Currie*, 1 K. & J. 605, and the cases in the next three notes.

(*l*) See *Jackson v. Sedgwick*, 1 Swanst. 460; *Pettyt v. Janeson*, 6 Madd. 146; *Simmons v. Leonard*, 3 Ha. 581. Compare *Lawes v. Lawes*, 9 Ch. D. 98, where the day for making up the accounts had been altered.



wise have been entitled to. (*m*) So where articles contained a stipulation that the partners should contribute to losses and share profits in a certain proportion, and it appeared that a person who managed the affairs of the firm had always received a share of the profits, but had never been called upon to contribute to losses, it was held that assuming him to be a partner in the proper sense of the term, and to have been originally bound to the articles to contribute to losses, the articles, so far as they oblige him so to contribute, had been varied by the conduct of the parties, and were no longer binding on him. (*n*)

**Varying articles.**— If it is proposed to make an alteration in the articles by an agreement which shall be binding on all parties, notice of the proposed change and of the time and place at which it is to be taken into consideration ought to be given to all partners. (*o*) For, even if the change is one which it is competent for a majority to make against the assent of the minority, all are \*entitled [\*410] to be heard upon the subject; and unless all have an opportunity of opposing the change, those who object to it will not be bound by the others. (*p*)<sup>1</sup>

**Reverting to original rules.**— It seems that a person who comes into a firm through another who has acquiesced in a variation of the terms of the partnership articles is bound by that acquiescence, and cannot revert to the original articles; (*q*) and this principle has been applied to companies. (*r*)

(*m*) *Ex parte* Barber, 5 Ch. 687.

(*n*) *Geddes v. Wallace*, 2 Bli. 270.

(*o*) See *Const v. Harris*, T. & R. 524.

(*p*) *Id.* 525. See, also, *id.* 518.

<sup>1</sup> If several persons enter into a written agreement of partnership, and the majority alter the agreement in a material point, those who do not assent may retire from the firm, provided they do it

within a reasonable time and under reasonable circumstances. *Abbot v. Johnson*, 32 N. H. 9. See, also, *Livingston v. Lynch*, 4 John. Ch. 573.

(*q*) See *Const v. Harris*, T. & R. 524.

(*r*) *Ffooks v. South-Western Rail. Co.* 1 Sm. & G. 142; *Peek v. Gurney*, 13 Eq. 79.

**Original articles apply to partnership continued under them.**—The last general rule which it is necessary to notice is this: if a partnership, originally entered into for a definite time, is continued after the expiration of that time without any new agreement, the articles under which the partnership was first carried on continue, so far as they are applicable to a partnership at will, to regulate the rights and obligations of the partners *inter se*. (s)<sup>1</sup> Thus in *King v. Chuck*, (t) three partners, A., B., C., agreed that if either of them should die, his capital, as appearing by the last account, should be paid to his representatives by the surviving partners, on whom the trade was then to devolve. A. died, and this agreement was acted on, and B. and C. continued in partnership without coming to any fresh agreement. Then B. died, and it was held that B. and C. had in fact continued in partnership on the old terms, and that B.'s executors were therefore to be paid the amount appearing to be his capital in the last account come to between him and C.

**Provisions applicable during the term of partnership.**

Even where a partnership is entered into for a term of years, and the articles provide for events happening *during the term*, or *during the partnership*, the above rule has been still applied. Thus, where two persons agreed to become partners for fourteen years, and stipulated that if either died

(s) See *Neilson v. Mossend Iron Co.* 11 App. Ca. 398, where a new agreement was contemplated, but not concluded; *Crawshay v. Collins*, 15 Ves. 228; *Featherstonhaugh v. Fenwick*, 17 Ves. 307; *Booth v. Parkes*, 1 Molloy, 465.

<sup>1</sup> See *Mifflin v. Smith*, 17 Serg. & R. 165; *Bradley v. Chamberlin*, 16 Vt. 613; *U. S. Bank v. Binney*, 5 Mason, 185; *Robertson v. Miller*, 1 Brock. 466; *Sangston v. Hack*, 52 Md. 173.

A partnership having expired by

the limitation in the articles, A., one partner, transmitted the articles to B., the other, with a renewal indorsed thereon, which B. agreed to, provided he should be relieved from his difficulties by the arrival of a certain ship. The ship arrived and B. resumed his duties as partner. *Held*, that the partnership was renewed for the original term, though there was no formal renewal. *Dickinson v. Bold*, 3 Dessau. 501.

(t) 17 Beav. 325.

during this copartnership term his share should be taken by the other at a certain sum, and the fourteen years expired, and the two persons continued in partnership together without coming to \*any fresh agreement, [\*411] and then one of them died, it was held that the above stipulation was binding, and that the share of the deceased belonged to the survivor upon payment of the sum mentioned. (u) The expression "the partnership term" was held equivalent to the time during which the partners continue in partnership without coming to any fresh agreement.

But the authorities on this head are not uniform. (x) In their present state it is doubtful whether a clause giving a right of pre-emption is one of those which is operative after the termination of the partnership originally contemplated, unless the articles are clear upon the subject. (y) A right of expulsion has been held not to apply to a partnership continued after the expiration of the time for which it was originally entered into. (z) But an arbitration clause has been held to apply. (a)

## SECTION II.—ON THE USUAL CLAUSES IN ARTICLES OF PARTNERSHIP.

**Usual clauses in partnership articles.**—Having now alluded to the more important general rules which require to be borne in mind in considering the effect of special agreements between partners, it is proposed to notice shortly the provisions usually met with in partnership articles, and the interpretation which has been put upon them by the courts.

(u) *Essex v. Essex*, 20 Beav. 442; is very shortly reported on this *Cox v. Willoughby*, 13 Ch. D. 863. point.

(x) Compare the two last cases (z) *Clark v. Leach*, 32 Beav. 14, with *Yates v. Finn*, 13 Ch. D. 839, and 1 De G. J. & Sm. 409. See and *Cookson v. Cookson*, 8 Sim. Neilson v. Mossend Iron Co. 11 App. Ca. 298.

(y) See the two last notes. *Yates v. Finn* was not referred to in *Willoughby v. Cox*, but the former case (a) *Gillett v. Thornton*, 19 Eq. 599.

In framing articles of partnership it should always be remembered that they are intended for the guidance of persons who are not lawyers; and that it is therefore unwise to insert only such provisions as are necessary to exclude the application of rules which apply where nothing to the contrary is said. The articles should be so drawn [\*412] as to be a code of directions, \*to which the partners may refer as a guide in all their transactions, and upon which they may settle among themselves differences which may arise, without having recourse to courts of justice.

**1. Nature and place of business.**—The nature of the business<sup>1</sup> should always be stated. Upon it depends the extent to which each partner is to be regarded as the implied agent of the firm in his dealings with strangers; and upon it also, in a great measure, depends the power of a majority of partners to act in opposition to the wishes of the minority. (*b*)

**Place of business.**—The place of business should also be stated; and if the place is held on lease which will expire during the partnership, provision should be made for the renewal of the lease or for the acquisition of another place of business. Otherwise the business may come to a premature end. (*c*)

**2. Commencement of the partnership.**—*Prima facie*, articles of partnership, like other instruments, take effect from their date; and if they are executed on the day of their date, and contain no expression indicating when the partnership is to begin, it must be taken to commence on

<sup>1</sup>The description, in an agreement, of the business of the partnership as "buying, selling and dealing in dry-goods and furnishing goods and such other merchandise as may be convenient and profitable to all parties concerned," is not so vague and indefinite as to render the contract void for uncer-

tainty. *Goldsmith v. Sachs*, 8 Saw. C. Ct. 110; S. C. 17 Fed. R. 726.

(*b*) See *ante*, p. 313 *et seq.*

(*c*) See *Clements v. Norris*, 8 Ch. D. 129, where the business was to be carried on at a particular place, or such other place as the partners might agree upon, and they disagreed.

the day of the date of the articles, and parol evidence to show that this was not intended is not admissible. (*d*)<sup>1</sup>

**Retrospective and prospective partnership.**—It occasionally happens that it is expressly declared by the partnership articles that the partnership is to date from a specified time, either prior or subsequent to the day on which the articles are executed. The effects of such a declaration as between the parties to the articles, and as between them on the one hand, and third persons on the other, are by no means the same. As between the parties themselves the time specified is that from which the accounts of profits and losses are to date; but as between those parties and third persons the time in question is of little, if any, importance; for an agreement that a partnership shall date from a time past does not \*inure to the benefit [\*413] of creditors; (*e*) and an agreement that it shall date from a time future does not prejudice them, if, in fact, the parties act as partners before such time arrives. (*f*)

**Formal contract to be drawn up.**—It occasionally happens that an agreement for a partnership is drawn up and signed, but a more formal instrument is intended to be executed. If in a case of this sort the execution of the formal instrument is delayed, the commencement of the partnership is not necessarily delayed also. Whether it is or is not must depend on the terms of the preliminary agreement; for by that agreement the parties are bound, and its terms will regulate their rights and obligations *inter se*, so long as the more formal instrument is unexecuted. (*g*)

(*d*) *Williams v. Jones*, 5 B. & C. 108. If the articles are not dated parol evidence is admissible to show that they were not to take effect from the time of their execution.

See *Davis v. Jones*, 17 C. B. 625.

<sup>1</sup>*Guice v. Thornton*, 76 Ala. 466.

A partnership agreement which contemplates action to be taken at once and continuously for the joint

benefit creates a present partnership, and not merely one that is to begin in the future. *Kerrick v. Stevens*, 55 Mich. 167; S. C. 58 id. 297.

(*e*) *Vere v. Ashby*, 10 B. & C. 288.

(*f*) *Battley v. Lewis*, 1 Man. & Gr. 155.

(*g*) See *England v. Curling*, 8 Beav. 133.

**3. The style of the firm.**—The name or style of the firm should be expressed; and it should be declared that no partner shall enter into an engagement on behalf of the firm except in its name. Such an agreement is capable of being enforced; (*h*) and it may be of use in determining, as between the partners, whether a given transaction is to be regarded as a partnership transaction or not.

**4. The duration of the partnership.**—If the time for which the partnership is to endure is not limited to a definite period, either expressly or by necessary implication, the partnership may be dissolved at the will of any partner. (*i*)<sup>1</sup>

(*h*) See *Marshall v. Colman*, 2 J. & W. 268.

(*i*) *Infra*, book iv, ch. 1, § 1.

<sup>1</sup>Until the contrary is shown the presumption is that a partnership shown to exist continues. *Anslyn v. Franke*, 11 Mo. App. 598.

Where a copartnership is formed to undertake a particular enterprise and complete the same in a specified manner, it will be implied that the partnership shall continue until the conclusion of the enterprise, even though its duration is not fixed by the articles. *Hubbell v. Buhler*, 43 Hun (N. Y.), 82.

Where a partnership is entered into for a stipulated period neither partner can dissolve the firm at pleasure on notice, without the consent of the other, unless such other has failed to observe or has violated the contract on his part. *Von Tagen v. Roberts*, 2 Pearson (Pa.), 137.

In a suit brought to recover damages for the breach of a contract to continue a partnership, the court was requested to charge the jury that, "if they found the defendant wrongfully dissolved and broke up the partnership, they were not con-

fined, in estimating damages, to the rate of profits at the time of the dissolution, but might consider and give damages for profits that would probably have been made by the higher prices, and might consider the present and probable future rate during the balance of the partnership; to which the court said: "Yes, I think that is a sound proposition; it requires some care. You are not to guess about this matter. If you can rationally see through this, that the profits would have been greater in the future, and are greater at the present time than at the time of the dissolution, and you believe that the present increased profits, if such there would be, are likely to continue and increase, and you can satisfy yourselves of this in your own minds, then you have a right to look through the remainder of the time of the partnership, making a very careful estimate in regard to what the profits might probably be." Subsequently the defendant's counsel requested the court to charge "that the profits which might have been made are too specula-

But it must not be forgotten that a partnership entered into for a definite time is dissolved by the death or bankruptcy of any one of its members before that time has expired, (*k*)

tive, vague and contingent, depending upon the many circumstances of fluctuation in prices, bad debts, etc., to form a basis of damages." The court responded: "I cannot charge that; you must judge for yourselves, applying those rules which I have enjoined, and that deliberation which the case requires." *Held*, that the rule of damages established by the rulings was erroneous, being of too speculative and conjectural character, and leaving the jury to make an estimate of the profits which would accrue during the stipulated term of partnership remaining, subsequent to the trial, from what in their view was probable on the subject, and without any data from which to estimate. *Van Ness v. Fisher*, 5 Lans. 236.

As to the measure of damages for the wrongful dissolution of a partnership, see *Ball v. Britton*, 58 Tex. 57.

A provision in articles authorizing one partner to terminate the copartnership at the end of the first year without notice if the business should not prove satisfactory to him construed as giving him an uncontrollable discretion. *Whitehead v. Howard*, 2 Rus. & Ches. (Nov. S.) 423.

In an action by one partner against his copartner upon articles of copartnership, to recover damages for the wrongful dissolution of the partnership by the defendant, *held*, that a technical breach of such articles is no breach at all,

and to entitle plaintiff to recover a wrongful breach must be shown. It is not sufficient for plaintiff to show that the defendant dissolved the firm, for he must prove in the first instance that he himself performed the covenants in all the articles on his part, and that the defendant without cause failed to perform his covenants. It being shown that the defendant had dissolved the partnership, the defendant justified by showing that the plaintiff had broken his covenant by not paying in his share of the capital as provided in the articles. *Held*, further, that the plaintiff could not show in rebuttal that before the articles were signed it was agreed that the plaintiff's capital must be paid out of money to become due to him by defendant out of another transaction; in such a case it is competent, in estimating the value of the contract, as measure of damages, to show the actual condition and situation of the business and assets of the firm together with proof as to the actual results accomplished in the business before the breach, the true measure being what the interest of the party aggrieved would sell for. *Reiter v. Morton*, 96 Pa. St. 229; S. C. 37 Legal Intel. 234.

As to whether any condition or limitation as to its duration can be engrafted upon the partnership contract as an implication from its nature, *quære*. *Walker v. Whipple*, 58 Mich. 476.

(*k*) *Ibid*.

and that it is therefore necessary to provide for these events in order to give effect to the agreement as to time.<sup>1</sup>

A partnership entered into for a certain time, and continued after that time has expired, is a partnership at will. (*l*)

**5. The premium.**—The points to be attended to with reference to this are, 1, when, to whom, and how it is to be paid; and 2, whether the whole or any part of it is [\*414] to be returned in \*any and what events. The law relating to this subject has been already noticed. (*m*)

**6. The capital and property of the firm.**—The articles should always carefully specify what is and what is not to be

<sup>1</sup>A provision in the articles of copartnership for a continuance, notwithstanding the death of a member, is valid and may be enforced; but as it is contrary to general rule of law, it must be clearly proved and strictly followed. *Alexander v. Lewis*, 47 Tex. 481. See *ante*, p. 231, note.

Where under the partnership articles the children of one partner were to succeed to the share and interest of their father in case of his death before the expiration of the partnership contract, and at his death, being *sui juris*, drew the amount monthly which their father was allowed to draw, *held*, that this was an acceptance of the successorship to all the interests and responsibilities of the deceased partner, and that the children were liable at the suit of a creditor of the firm. *Nave v. Sturges*, 5 Mo. App. 557.

Articles of copartnership contained the provision "that, in case of the death or bankruptcy of any of the said parties, in order to prevent any altercation with the heirs, executors, administrators or assigns of the deceased or bank-

rupt, the shares of the profits, as well as capital, of the deceased or bankrupt shall be paid by the survivors or solvents agreeably to the yearly statements of the company's affairs prior to his death or bankruptcy." *Held*, that this clause applied to real estate belonging to the firm as well as to personal, and that, on the death of a partner in whom alone was the legal title to land for the benefit of the firm, the whole beneficial estate therein survived to the surviving partners. *Robertson v. Miller*, 1 Brock. 466.

Where a partnership was formed between an individual on the one part, and a pre-existing firm on the other part, *held*, that a provision in the articles of partnership that the firm should continue "until dissolved by and with the mutual consent of both parties" did not authorize the survivors to continue the partnership business after the death of one of the partners. *Egberts v. Wood*, 3 Paige, 517.

(*l*) *Featherstonhaugh v. Fenwick*, 17 Ves. 307; *Neilson v. Mossend Iron Co.* 11 App. Ca. 298, and *infra*, book iv, ch. 1, § 1.

(*m*) *Ante*, p. 64 *et seq.*



considered partnership property; particularly where one partner is, or is to be, solely entitled to what is to be used for the common purposes of all. If one partner is entitled to land which is to become partnership property, it is usual (in order to prevent a sale to a person for value without notice) to have that land conveyed or assigned to trustees for the firm; but, as between the partners themselves, all that is requisite is to declare in the articles that the land shall form part of the assets of the firm. It is also prudent to declare that, as between the real and personal representatives of any deceased partner, his share shall be deemed personal estate. It should be declared that apprentice fees and other casual payments belong to the firm, and form part of its profits.

If the firm is to spend money on the separate property of one of the partners, the right of the firm to a lien for its outlay should be expressly stipulated for or expressly excluded. (*n*)

**Official appointments.**—A kind of property which is difficult to deal with, and which should always be made the subject of an express agreement, is the benefit accruing from an office or appointment obtained by one of the partners. For example, in the case of a firm of solicitors, one of them may be a clerk to some turnpike trust, or to a poor-law board, or he may hold some other appointment yielding a salary. Care should always be taken to specify whether the salary is to belong solely to the partner holding the appointment, or whether it is to form part of the partnership assets; (*o*) and, if the latter, provision should be made for the payment of a sum by the partner holding the appointment in the event of the dissolution of the firm whilst the appointment continues. If the profits of the office are \*partnership assets, and the firm is dissolved [\*415]

(*n*) *Ante*, pp. 330 and 384.

(*o*) See *Collins v. Jackson*, 31 Beav. 645, noticed *ante*, p. 331, where profits arising from appointments of this sort were held to belong to the partnership, although *prima facie* they do not.

whilst the office is held by one of its members, the court, in winding up the partnership, will leave him in the enjoyment of the office, but charge him with its value in his account with the firm. (*p*)

**Trade secrets, patents, etc.**—When a partnership is formed for working some secret and unpatented invention, the articles should specify to whom exclusively the right of working such invention shall belong in the event of dissolution. For, if there be no agreement on the subject, all the parties will have a right to work it, in opposition to each other, there being no ground upon which any of them can be prevented from so doing. If, however, it can be proved by the inventor that his secret was to be kept from his copartners, or that they, if they discovered it, were not to make use of their discovery, they will not be allowed to violate the agreement into which they have entered or the trust reposed in them; and the circumstance that the invention has not been patented will not be material. (*q*)

**Good-will.**—*Good-will* is a kind of property which ought also to be expressly provided for; but this is most conveniently done in connection with the dissolution clauses. (*r*)

**Contributions of capital.**—The proportions in which the capital is to be contributed by the partners, and the proportions in which they are to be entitled to it when contributed, ought also to be carefully expressed.<sup>1</sup> It by no

(*p*) See *Smith v. Mules*, 9 Ha. 556; *Ambler v. Bolton*, 14 Eq. 427.

(*q*) See *Morrison v. Moat*, 9 Ha. 241.

(*r*) See as to this, *infra*.

<sup>1</sup>See *Adams v. Gordon*, 98 Ill. 598, as to right of representative of deceased partner where the amount of the capital stock is nominally much larger than the reality.

A recital in a written contract of copartnership, that each partner had paid so much money as

his share of the capital, is not conclusive, and will not work an estoppel, but like an ordinary receipt may be explained, qualified, or even contradicted. *Lowe v. Thompson*, 86 Ind. 503.

As to the non-right of one partner to use his power, under the articles, of increasing capital for the purpose of resisting plaintiff's demand for return of his surplus, see *Heslin v. Fay*, 15 Ir. L. R. Chy. D. 431.

means follows that the partners are to be entitled to the assets in the proportions in which they contribute to the capital. Indeed, if no express declaration upon the subject is made, the *prima facie* inference is that all the partners are entitled to share the assets (minus the capital) equally, although they may have contributed to the capital unequally. (s)

**Capital should be money.**—The capital should be expressed to be so much money; and if one of the partners is to contribute lands or goods instead of money, such lands or goods should have a value set upon them, and their value in money should be considered as his contribution. If this be not done, the articles and accounts \*and the proportions in which profits and losses are [\*416] to be shared will be less perspicuous and free from doubt than will otherwise be the case; and the partner who contributes land will generally be inclined to look upon such land as his, and not as part of the common stock.

**Rules as to conditions precedent.**—When the articles provide that each partner shall bring in so much capital, or do some other specified thing, the question sometimes arises how far the fulfillment by each of his obligations is a condition precedent to his right to call for fulfillment by the others of their obligations. The rules laid down in the well-known note to *Portage v. Cole* (t) must be applied to all such cases. These rules are as follows:

“1. If a day be appointed for payment of money, or part of it, or for doing any other act, and the day *is* to happen, or *may* happen, *before* the thing which is the consideration of the money or other act is to be performed, an action may be brought for the money or for not doing such other act *before* performance; for it appears that the party relied upon his *remedy*, and did not intend to make the *performance* a condition precedent; and so it is where *no time* is fixed for performance of that which is the consideration of the money or other act.

“2. When a day is appointed for the payment of money, etc., and the day is to happen *after* the thing which is the consideration of the money,

(s) *Ante*, pp. 348 *et seq.*, and (t) 1 Wms. Saund. 320, a. 402-3.

etc., is to be performed, no action can be maintained for the money, etc., before performance.

"3. Where a covenant goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the covenant on the part of the defendant without averring performance in the declaration.

"4. But where the mutual covenants go to the *whole consideration* on both sides they are mutual conditions, and the performance must be averred.

"5. Where two acts are to be done at *the same time*, as where A. covenants to convey an estate to B. on such a day, and in consideration thereof B. covenants to pay a sum of money on the *same day*, neither can maintain an action without showing performance of, or an offer to perform, his part, though it is not certain which of them is obliged to do the first act; and this particularly applies to all cases of sale."

In conformity with these rules it was held, in *Stavers v. Curling*, (*u*) that the plaintiff, who had covenanted to proceed on a whaling voyage, and to obey the instructions of the \*defendants, but who had not obeyed them, could nevertheless maintain an action against them for the share of the profits which they had covenanted to pay him, although they had only covenanted to pay him on the performance by him of his covenants.

So in *Kemble v. Mills*, (*x*) where two persons had agreed to become partners, and one of them was to bring in 2,000*l.* and do certain things, and the other was to bring in 5,000*l.*, it was held that an action lay for non-payment of the 5,000*l.*, although the plaintiff did not state that he had brought in his 2,000*l.*, or had done any other of the acts which he had agreed to do.

**Bringing in so much in good debts.**—Capital is sometimes agreed to be brought in in the shape of good debts. Where, on the formation of a partnership, it was agreed that one of the partners should bring in 40,000*l.* of good debts, and that sum was owing to him by persons who continued customers of the firm after its formation, and be-

(*u*) 3 Bing. N. C. 355.

Compare *Marsden v. Moore*, 4 H.

(*x*) *Kemble v. Mills*, 9 Dowl. 446. & N. 500.

came indebted to it, and who in time paid it 40,000*l.* and more, it was held that this sum had been brought in as agreed. For nothing having been said as to the accounts on which the payments were made, and each customer's account having been kept in such a way as to form one single continuous account, the 40,000*l.* was treated as having been paid in discharge of the earliest items in their respective accounts; or, in other words, in discharge of the debts owing to the partner who undertook to bring in that amount of good debts, and not in discharge of the subsequent debts contracted with the firm. (*y*)

In *Cook v. Benbow*, a father, who was in business, took his sons into partnership, and agreed to bring into the business all the capital, plant and stock in trade then and usually employed by him in the business. In estimating the capital the book-debts due to the father were valued at twenty per cent. below their nominal amount, but they in fact realized more; and it was held that the surplus constituted part of \*the father's capital, and not part [\*418] of the profits of the partnership. (*z*)

**Guaranty against debts.**—When a person is about to enter a firm he sometimes requires a guaranty that its debts do not exceed a certain sum.<sup>1</sup> If such a guaranty is given, and it turns out that the debts of the firm exceeded the sum mentioned at the time in question, the guarantor is liable to an action; and the amount of damages which the plaintiff is entitled to recover is the loss he has sustained in consequence of the excess of debts above the sum mentioned; but not the loss he may have suffered by having joined the firm. (*a*)

(*y*) *Toulmin v. Copland*, 2 Cl. & Fin. 681; S. C. 3 Y. & C. Ex. 636.

(*z*) *Cooke v. Benbow*, 3 De G. J. & Sm. 1.

<sup>1</sup> An agreement for the purchase of the half interest in a business for a certain sum of money, with an agreement to pay one-half of \$4,000 of the "debts owing on

stock" out of the proceeds of the partnership business, construed to include a claim for work in making clothing, some for customers, others to be sold with the stock. *Jones v. Bartlett*, 50 Wis. 589.

(*a*) *Walker v. Broadhurst*, 8 Ex. 889.

**7. Interest, allowances, etc.**—The allowance of interest on capital and on advances should be made the subject of special agreement. The interest should be made payable before the profits to be divided are ascertained, and the interest on advances should be made payable before interest on capital. (*b*)

**Moneys to be drawn out.**—Most articles of partnership contain a clause authorizing each partner to draw out of the partnership funds a certain sum per month for his own private purposes.<sup>1</sup> Such a clause should provide for the repayment with interest of whatever may be drawn out in excess of the sum mentioned.

**Expenses to be charged to the firm.**—The articles should also specify what expenses are to be borne by the firm; and particular notice should be taken of allowances of an unusual kind, but which the partners may intend shall be made, *e. g.*, an allowance for treating customers, for management, for rent, maintenance of servants, etc., etc. (*c*)<sup>2</sup>

(*b*) See, as to interest, when there is no agreement to allow it, *ante*, p. 389. 91 N. Y. 43; S. C. 25 Hun. (N. Y.), 124.

<sup>1</sup> Where one partner who had overdrawn his account, according to the provision in the articles, agreed to pay ten per cent. per annum upon such overdrafts, and to secure the same executed his bond and mortgage, in an action to foreclose the mortgage, wherein the defense was usury, it appearing that the agreement was not a device to evade the usury law, *held*, that the overdrafts were not usurious loans; that the agreement was in effect simply that the partner withdrawing funds should make a contribution to profits equal to the estimated earning power of the capital withdrawn, and so was valid. *Payne v. Freer*, 91 N. Y. 43; S. C. 25 Hun, 124.

(*c*) *Ante*, p. 383.

<sup>2</sup> The managing partner of an ordinary partnership is entitled to be reimbursed his actual expenses necessarily incurred in the interest of the partnership. *Bayly v. Becnel*, 36 La. Ann. 496.

Any reasonable expense incurred by either member of a firm, with or without the consent of the rest, in the legitimate prosecution of the firm's business and for the benefit

**8. Conduct and powers of partners.**— It is the practice to insert in partnership articles an express covenant by each

of the partners, should be allowed upon a partnership accounting. *Sweeney v. Neely*, 53 Mich. 421.

Insurance of partnership property allowed as expense. *Livingston v. Blanchard*, 130 Mass. 341.

Actual expenses of partners in effecting compromises with creditors in settling up the firm affairs are a valid claim against the firm. *In re Peoples' Union Bank*, 16 Weekly Not. Cas. 127.

A reasonable sum paid to a competent accountant for the purpose of adjusting the affairs of the firm, held to be a proper common charge. *Godfrey v. White*, 43 Mich. 171.

In an action for the infringing of a copyright, when the infringers are partners, and under the partnership agreement each member is entitled to draw out of the business, for his personal expenses and support, a specific sum per annum, the amount so drawn out by the respective partners cannot be included as a part of the general expenses of the firm in conducting its business in order to arrive at the percentage of such expenses. *Rubber Company v. Goodyear*, 9 Wall. 788; distinguished, *Myers v. Callaghan*, 24 Fed. R. 636.

A provision in a partnership contract that each partner should pay his own individual expenses must be understood as intended to apply when the parties were at home, and not when traveling on the business of the concern. *Withers v. Withers*, 8 Pet. 255.

Where articles of copartnership stipulated that the capital and profits should remain in the con-

cern, each party being at liberty to draw from the joint funds so much only as was necessary for his private expenses, *held*, that plate, furniture, carriages, etc., did not come within the provision, but that the expenses of the family and education of the children did. *Stoughton v. Lynch*, 1 Johns. Ch. 467.

Where one entered into a copartnership with his son-in-law, and it was agreed that the father-in-law should furnish a house for a shop, tools, etc., and a house for the defendant to live in, and that he "should be at no expense," *held*, that these words must be intended to mean expense for things connected with the business, and not family expenses. *Brown v. Haynes*, 6 Jones, Eq. 49.

By an agreement to share profits the active partner was to be allowed, on adjustment of accounts, "the actual expenses that may appertain to the goods themselves;" the court allowed the expenses for taxes, advertising, and clerk hire, caused in the trade in question, and in connection with that part of such partner's property employed therein. *Foster v. Goddard*, 1 Black, 506.

A copartnership was formed to work a mining interest in several lots of land owned by the partners; by the articles each partner was to pay his proportion of the expenses, in the ratio of his interest in the respective lots; some parts of the partnership accounts were so kept that their apportionment was readily made; but a portion of them were so kept that the ex-

partner to be true and just in all his dealings with the others. This, however, is always implied; and the clause in question is of little use in a legal point of view, although it may serve to remind the partners of their mutual obligations to good faith.

The effect of the clause in creating a specialty debt [\*419] is very \*limited. In *Powdrell v. Jones*, (d) two partners covenanted that they respectively would be true and just to each other in all their contracts, reckonings, receipts, payments and dealings; and each bound himself to the other in the penal sum of 5,000*l.* for the due performance of the covenants in the articles. One of the partners became greatly indebted to the firm in respect of receipts by him on its account. It was contended that the debt was a specialty debt by reason of the covenant above referred to; but it was held that the debt was only a specialty debt to the extent of 5,000*l.*, the amount of the penalty in which each partner was bound to the other, and that the residue of the debt was a simple contract debt only.

**Hiring servants, etc.**—It is useful to state who is to have the power of hiring and dismissing servants. (e)

**Amount of attention to be given to affairs of the firm.** The time and attention which the partners are to give to

pense incurred on the respective lots could not be separated. *Held*, that in adjusting this portion of the accounts the entire expense of working all the lots must be apportioned among them respectively in the proportion of the value of the mineral raised from each, and then the partners must be charged in the ratio of their interests in each lot. *Levi v. Karrick*, 13 Iowa, 344.

Where the articles of copartnership distinguished between the obligation of the parties to contribute for the expenses of repairs to machinery, or new machinery to supply the place of any worn out, and

the obligation to contribute for the purchase of additions to the machinery, *held*, that a new foundation for a new engine put in a mill in place of an old one discarded, built for it because the foundation of the old engine, if repaired, was not sufficient for the new engine, must be considered as an addition and not as repairs, under articles distinguishing additions from repairs. *Dunnell v. Henderson*, 23 N. J. Eq. 174.

(d) *Powdrell v. Jones*, 2 Sm. & G. 305.

(e) See *ante*, p. 313.



the affairs of the firm should be expressly mentioned;<sup>1</sup> especially if one of them is to be at liberty to give less of

<sup>1</sup>See *Leighton v. Hosner*, 39 Iowa, 594. A partner who agrees to "take charge of the entire business, and exert his utmost attention and time" for it, must account for the ordinary profits of such business, or explain the causes which have rendered it less productive. *Stidger v. Reynolds*, 10 Ohio, 351.

A partner who, in violation of the act of partnership, enters into another firm, does not thereby give the right to his original copartner to claim a share in the profits of the new firm; the violation of the agreement may give rise to an action for damages, but the injured party cannot claim to be made a partner in the second firm. *Murrell v. Murrell*, 33 La. Ann. 1233.

Provision in articles of copartnership that one partner shall be at liberty during the term to carry on other business and to absent himself from attendance to the partnership business construed. *McFerran v. Filbert*, 102 Pa. St. 73.

Where the articles bind each partner to devote his whole time and attention to the business, and on a settlement one partner was charged with the sum which he agreed to pay for the privilege of undertaking an agency for a third person outside the partnership business, the amount so charged should be credited to the partnership and not to the other party individually. *Couch v. Woodruff*, 63 Ala. 466.

Where the articles provided that each partner should give the business of the firm his whole time and attention "except such time as may be proper for the fulfilling of

the duties of any office or agency held individually by either partner, . . . and neither partner shall accept or continue to hold any office or agency unless by consent of his copartner, *held*, that the exception applied both to offices and agencies held at the time of the partnership or at any time during its continuance, and that the partner so holding any such office or agency was alone entitled to the profits thereof. *Starr v. Case*, 59 Ia. 491.

If a member of a firm whose articles provide that each partner is to give his time to the firm business and not to engage in any other business in his own name and account to the detriment of the firm uses his time, and labor and materials belonging to the firm, in making improvements in the machines manufactured and sold by the firm, with the knowledge and without objection from the other partners, they can claim no interest in letters patent procured by him at his expense and in his own name for such improvements. *Burr v. De La Vergne*, 102 N. Y. 415; *Belcher v. Whittemore*, 134 Mass. 330. See, also, *Keller v. Stoltzenbach*, 20 Fed. R. 47.

Where, however, by an agreement between copartners, the firm is to acquire a joint right in any inventions, the partner to whom a patent for which such an invention is issued may not claim the exclusive benefit thereof. *Burr v. De La Vergne*, 102 N. Y. 415.

Where a partner by articles bound himself first to devote his

his time and attention than the others. Inattention to business by reason of illness is, however, no breach of an agreement to attend to it. (*f*)

**Stipulations that one partner shall not do certain things without the consent of the others.**—It is usual to insert in partnership articles a clause prohibiting any partner from doing certain things without previously obtaining the consent of the others; *e. g.*, becoming surety, releasing debts, speculating in the funds, drawing, accepting or indorsing bills, otherwise than in the usual course of business, etc., etc.<sup>1</sup>

**Agreement not to carry on any other business.**—An agreement not to carry on any other business is binding and can be enforced; but a breach of it does not necessarily involve a liability to account to the firm for the profits derived from the business carried on in violation of the agreement. (*g*)

**Majority.**—If the number of partners exceeds two the majority should be expressly intrusted with the power of

time, labor, etc., to partnership business, and second, not to carry on the partnership business otherwise than as partner, it was held that the latter negative obligation might be enforced by injunction, but that the former could not be specifically enforced. *Levine v. Michael*, 35 La. Ann. 1121.

A provision in the articles assigning to one partner the duty of conducting the financial settlements may not be construed as abrogating or dividing the general partnership authority and giving one the absolute and exclusive control over the finances of the firm. Such intention must be clearly and distinctly expressed. *Sweet v. Morrison*, 103 N. Y. 235.

(*f*) *Boast v. Firth*, L. R. 4 C. P.

1; *Robinson v. Davison*, L. R. 6 Ex. 269.

<sup>1</sup>In order to recover for an alleged breach of an agreement between copartners, that neither should indorse the firm name on any promissory note, where it was proved that the defendant indorsed the firm name on such a note for the accommodation of a third person in a matter not connected with the firm business, *held*, that the plaintiff must prove the agreement set out in the complaint, and could not recover by showing merely that the indorsement was made without the knowledge of defendant's copartner. *Ritter v. Galitzenstein*, 13 Daly, 452.

(*g*) *Dean v. Macdowell*, 8 Ch. D. 345. And see *ante*, book iii, ch. 2, § 2.

deciding what shall be done as regards any matter in dispute between the partners, and relating to the business of the partnership, as \*defined by the articles. [*h*] It is difficult to lay down a general rule for the determination of what is to be done if the partners are equally divided. Articles of partnership, as usually drawn, are silent upon this question; but if it were declared that in such a case matters should be left in *statu quo*, probably some little assistance would be given to the preservation of peace and good will.

**9. Custody of the partnership books.**—In order to prevent any disputes as to the custody of the partnership books it is advisable to declare that they shall be kept at the office of the partnership, and that each partner shall have free access to them. A court will restrain the removal or detention of the partnership books contrary to an express agreement entered into by the partners; [*i*] and even in the absence of any special agreement the court would probably interfere, for it is an implied obligation on the part of every partner not to exclude his copartners from access to the books of the firm. [*k*]

**10. Accounts to be kept and taken.**—The object of taking partnership accounts is twofold, viz.: 1. To show how the firm stands as regards strangers; and 2. To show how each partner stands towards the firm. The accounts, therefore, which the articles should require to be taken, should be such as will accomplish this twofold object. The articles should consequently provide, not only for the keeping of proper books of account, and for the due entry therein of all receipts and payments, but also for the making up yearly of a general account showing the then assets

(*h*) See as to the powers of a majority, *ante*, p. 313 *et seq.*, and *Falkland v. Cheney*, 5 Bro. P. C. 476, which turned on the wording of the articles.

(*i*) See *Taylor v. Davis*, 3 Beav.

388, note; *Greatrex v. Greatrex*, 1 De G. & Sm. 692.

(*k*) In *Greatrex v. Greatrex*, 1 De G. & Sm. 692, it does not appear whether any express agreement as to the custody of the books had been entered into or not.

and liabilities of the firm, and what is due to each partner in respect of his capital and share of profits, or what is due from him to the firm, as the case may be.<sup>1</sup>

**Accounts agreed to not to be re-opened.**—In order, moreover, to prevent accounts which have been once fairly taken and settled from being afterwards disputed, the articles usually declare that an account, when signed, shall be treated as conclusive; or not be opened except [\*421] for some \*manifest error discovered within a given time. A provision to this effect is extremely useful, and should never be omitted; (*l*) but however stringently it may be drawn, no account will be binding on any partner who may have been induced to sign it by false and fraudulent representations, or in ignorance of material circumstances dishonorably concealed from him by his copartners. (*m*) Where, however, all parties act *bona fide*, such clauses are operative; but the usual provision as to manifest errors applies only to errors in figures and obvious blunders, not to errors in judgment, *e. g.*, in treating as good debts which ultimately turn out to be bad, or in omitting losses not known to have occurred. (*n*) All errors are manifest when discovered; but such clauses as those here alluded to are intended to be confined to oversights and blunders so obvious as to admit of no difference of opinion.

<sup>1</sup> When the articles contain no agreement for periodical rests, and there is no agreement or usage for stated settlements of the accounts of the partners, they can only be stated at the close of the partnership, for the reason that it can only then be ascertained whether there are profits and losses; and until this is done interest cannot be charged or credited the several members for the sums taken out in excess of the partner's share of profits or for moneys advanced in

excess of his indebtedness to the firm. *McCall v. Moss*, 112 Ill. 493; S. C. 75 Ill. 190.

(*l*) See the observations of V.-C. Bacon in *London Financial Aid Ass. v. Kelk*, 26 Ch. D. 151.

(*m*) See *Oldaker v. Lavender*, 6 Sim. 239; *Blisset v. Daniel*, 10 Ha. 493.

(*n*) See *Ex parte Barber*, 5 Ch. 687; *Laing v. Campbell*, 36 Beav. 3, where, however, there were no articles.

**Accounts conclusive for one purpose but not for another.**—Moreover, an account may be conclusive for one purpose, although not for another, *e. g.*, for the purpose of calculating the profits to be divided so long as the firm is unchanged, but not for calculating the total amount to be paid to a partner on his expulsion from the firm. (*o*)

So, from the fact that nothing is reckoned for good-will in taking annual accounts with a view to a division of profits, it does not follow that the good-will is not to be reckoned on a dissolution of the partnership by the death or retirement of a partner. (*p*) Nor does it follow that because profits and losses are annually divided equally the losses on a final winding up are to be divided equally, without reference to the capitals of the partners. (*q*)

A most important and instructive case on this subject is *Coventry v. Barclay*. (*r*) There it was provided that accounts \*should be taken and signed yearly, and [\*422] not be afterwards disputed, and that on the death of a partner the survivors should be at liberty to take his share at its value according to the last annual account preceding his death. The partners were accustomed in their annual accounts to put a nominal value on their plant and stock in trade, and to carry over a portion of their profits to a separate account in order to form a reserve fund to answer unforeseen losses. Shortly before the death of one of the partners the others *bona fide* made up an annual account in the usual way, and sent him a copy of it, which he never signed, but never in any way disapproved. It was held (both by Lord Romilly and Lord Westbury) that the executors of the deceased partner were bound by the nominal valuation of the stock, etc., but (by Lord Westbury, reversing the decision below) that they were entitled to a

(*o*) *Ante*, pp. 401, 402; *Blisset v. Daniel*, 10 Ha. 493. Compare *Coventry v. Barclay*, *infra*. (*q*) *Binney v. Mutrie*, 12 App. Ca. 160; *Wood v. Scoles*, 1 Ch. 369.

(*p*) *Wade v. Jenkins*, 2 Giff. 509. (*r*) 33 Beav. 1; and on appeal, 3 De G. J. & Sm. 320. See, also, *Ex parte Stuart v. Gladstone*, 10 Ch. D. 626. *parte Barber*, 5 Ch. 687.

share of the surplus of the reserve fund after paying the losses, etc., to meet which it was created.

**Accounts not signed.**—The accounts having, in this case, been taken *bona fide* and in the usual way, and no errors being suggested, the absence of the deceased partner's signature was treated as of no importance, for he could not properly have refused to sign them. (*s*)

**11. Retiring from the firm.**—In the absence of a special provision enabling a partner to retire, there is no method by which he can do so without a general dissolution and winding up of the firm; unless, of course, some agreement can be made between all the partners at the time of retirement. Moreover, as will be seen hereafter, (*t*) a partnership which has been entered into for a definite time cannot be dissolved at the will of any member. It is obviously, therefore, in many cases necessary to insert in the articles a special clause enabling a partner to retire, and defining the terms on which, as between himself and co-partners, he is to be at liberty so to do. (*u*)

**Power to sell share.**—If it is provided that a partner may sell his share, and no restrictions<sup>1</sup> are mentioned, he

(*s*) The same thing occurred in *Ex parte Barber*, 5 Ch. 687.

(*t*) Book iv, ch. 1, § 1.

(*u*) As to the interest in the goodwill where nothing is said about it, see *infra*.

<sup>1</sup> A stipulation in articles of copartnership that neither party shall, without the other's consent, sell or assign his interest in the copartnership, or in any property thereof, restricts the *jus disponendi* only during the continuance of the copartnership, and not after its dissolution and the appointment by the court of a receiver of the partnership property. *Noonan v. McNab*, 30 Wis. 277; *Noonan v. Orton*, 31 Wis. 265.

Articles of copartnership containing power to appoint a successor, appointment not to take effect during minority of appointee, construed. *Cuffe v. Murtagh*, 7 Law Reporter (Irish), 411.

Stipulation in a will respecting the terms upon which the surviving partner might purchase the decedent's interest in the firm business construed. *Locken's Estate*, 39 Leg. Intel. 129.

In *Baxter v. Bell*, 86 N. Y. 195, a bond secured by mortgage on firm real estate to a retiring member of the firm, for his interest, was held to be a firm debt of the others, who continued the business under a new firm name.

may sell to any one he likes, even to a pauper; and, on giving his copartners notice of his withdrawal from the firm, he will cease to be a member thereof as between himself and them, even although the purchaser \*from [\*423] him does not come forward and take his place as a partner in the firm. (x)

**Copartners to have refusal of share.**—It is sometimes declared that a partner who is desirous of retiring shall offer his share to his copartners before selling it to any one else.<sup>1</sup>

(x) *Jefferys v. Smith*, 3 Russ. 158, *ante*, p. 365.

<sup>1</sup> A provision in partnership articles that neither of the partners should sell or assign his interest without consulting the other partners, and giving them the preference, does not by implication authorize the introduction of a stranger into the firm by one of the partners, on a refusal by the rest to purchase his share. *McGlensey v. Cox*, 5 Pa. Law J. Rep. 203.

The plaintiffs and defendants became partners in the manufacture of a patent medicine, with a written agreement that the firm should continue ten years unless the plaintiffs desired to dissolve it sooner, by a notice for that purpose, and that upon dissolution the recipe should be sold to the highest bidder of the parties. The plaintiffs gave notice of a dissolution, and that the recipe, trade-mark, etc., would be sold at auction by B. at the Merchants' Exchange. The property was then sold to the plaintiffs, the defendants refusing to concur in the sale or to bid. *Held*, that the agreement contemplated a friendly dissolution, and a sale at auction by mutual consent, and that the parties should bid

therefor among themselves; but that no authority was given to either to fix the time or place of sale, or to select an agent to make it; and that the plaintiffs obtained no title by their purchase. *Comstock v. White*, 31 Barb. 301.

A provision in the articles that, upon the death of either partner, the property shall vest in the survivor and that he shall become debtor to the deceased partner's representatives for its value, is valid. *Gaut v. Reed*, 24 Tex. 46.

N., being engaged in an insurance and real estate business, sold one-half of his interest therein to R., and they entered into a written contract to carry on the business as partners, with a stipulation that in case of a dissolution "the party continuing the business" should pay "the retiring party" a certain sum. After the firm had carried on the business some years, the partnership was dissolved in consequence of a disagreement. At that time the real estate business of the firm had become small, but they were agents for seven insurance companies; several days before the dissolution, N., without the knowledge of R., wrote to each of said companies that he could no longer

In a recent Scotch case a clause of this kind was held not to preclude one of the continuing partners from buying for himself the share of the outgoing partner. (*y*)

In *Homfray v. Fothergill*, (*z*) the articles provided that the offer should be made first to the other partners collectively; and if they should decline, then to those desirous of collectively purchasing; and if none such, then to the partners individually. It was held that an offer by one partner to all the others was equivalent to an offer to all of them, and also to such of them as might be desirous of buying, and that one of them having declined to buy, the others were at liberty to do so, although no fresh offer to sell to them had been made, and the retiring partner refused to make such offer.

**How notice given.**—In *Glassington v. Thwaites*, (*a*) the articles provided that no share should be disposed of by any partner until one month after notice in writing under his hand had been given to the other proprietors at a monthly meeting. A partner desirous of selling his share wrote a notice to that effect in a book which was produced at monthly meetings, and which all the partners had at all

continue the partnership, and soliciting for himself the agency of such company; and he was made agent for five of them, one of the others ceasing to take new risks and the other transferring its business to a third person. N. took from the late office of the firm all the books of the companies which had made him their agent, and of the one which had ceased to do new business, and thereafter transacted their business as the firm had formerly done, doing also some land business for a customer of the late firm; while R. transacted no insurance or real estate business after the dissolution. It does not appear that R. was ever solicited to aid N. in procuring the agencies

of the companies previously represented by the firm, nor that he ever objected to such transfer. *Held*, to establish a retirement of R. from the firm and a continuance of the firm business by N., of whom R. was entitled to recover the sum named in the contract. *Read v. Nevitt*, 41 Wis. 348.

Partnership articles as to the right of pre-emption of the share of a partner upon his withdrawal, etc., construed. *Frank v. Beswick*, 44 U. C. (Q. B.) 1.

(*y*) *Cassels v. Stewart*, 6 App. Ca. 64. The clauses were not so worded as to prevent such a sale.

(*z*) 1 Eq. 567.

(*a*) *Coop. temp. Brougham*, 115.



times power to inspect. It was held that the notice so given was sufficient, even although the book was not seen by all the partners. As a general rule, however, notice should be given to each partner individually. (b)

**Sale if offer is declined.**—Where two persons became partners, and agreed that, in the case of the death of either, the other should buy his share, or, if he declined so to do, then the share of the deceased should be sold to any person who might choose to buy it, one of the partners died, and the survivor declined to buy his share, or to enter into partnership with any purchaser of it. Under these circumstances, the court, at the suit of the \*executor [\*424] of the deceased partner, decreed a sale of his share, and directed that, if no *bona fide* sale could be effected, an account should be taken in order to ascertain the value of such share. No sale being effected, and the accounts having been taken, the surviving partner was decreed to pay the amount of the share of the deceased and the costs of the suit. (c)

**Declaring option to purchase.**—Articles of partnership frequently contain a clause to the effect that, in case a partner is desirous of retiring, he shall give so many months' notice to his copartner, who shall have the option of purchasing the share of the retiring partner. If such a clause is acted on, and a partner notifies his desire to retire to his copartner, and the latter declares his option to purchase the share of the retiring partner, a contract is thereby concluded between them, from which neither can depart without the consent of the other. (d) Consequently the retiring partner cannot withdraw his notice and dissolve the partnership under some other clause in the deed. (d) Even if the copartner who is to purchase the other's share infringes the partnership articles, the court will not willingly interfere and dissolve the partnership; although, if the partner

(b) Id.

(d) See *Warder v. Stilwell*, 3 Jur.

(c) *Featherstonhaugh v. Turner*, N. S. 9, V.-C. Stuart; *Homfray v. 25 Beav.* 382.

*Fothergill*, ante, p. 423.

who is to retire conducts himself so as to prejudice the business and exclude the other, the court will interpose for the protection of the latter; for otherwise the business to which he is shortly to be solely entitled may be entirely ruined. (*e*)

**Enlarging time for purchasing.**—With respect to the exercise of a right of pre-emption, it must be borne in mind that if the right is to be exercised within a given time it cannot be exercised afterwards, unless the time has been enlarged by the parties themselves. Courts will not extend the time on the ground that it was accidentally allowed to slip by. (*f*)

Where an offer to sell was made to a person who became lunatic after it was made, but before the time for accepting it had expired, it was held that his committee was [\*425] not \*entitled to an extension of such time, nor to a renewal of the offer. (*g*)

**12. Dissolving the firm.**<sup>1</sup>—Where the articles expressly stipulate that it shall be lawful for either partner to dissolve the partnership upon the commission, by the other, of certain specifically forbidden acts, the partnership may, of course, be determined if either partner does these acts. But this clause, like any other, may be waived by mutual consent; and, even if not waived, advantage cannot be taken of it to dissolve the partnership on the ground of the commission of any forbidden act, after the lapse of any consid-

(*e*) See *Warder v. Stilwell*, 3 Jur. N. S. 9.

(*f*) See, on this subject, *Brooke v. Garrod*, 2 De G. & J. 62; *Lord Ranelagh v. Melton*, 2 Dr. & Sm. 278.

(*g*) *Rowlands v. Evans and Williams v. Rowlands*, 30 Beav. 302.

<sup>1</sup> See *ante* as to agreements for a dissolution.

As to a plea alleging an agreement regarding survivorship not being subject to the objection that

it was in conflict with written articles, or that it varied a written contract, see *Lewis v. Alexander*, 51 Tex. 578.

As to the extent of the liability of sureties in a bond given by one partner to another on the dissolution of the partnership to secure the sum found due upon an account, see *Delo v. Banks*, 101 Pa. St. 458; S. C. 13 Weekly Not. Cas. 463.

erable time since such act came to the knowledge of the partner seeking to avail himself of it. (*h*)

**In case of insolvency.**—It is not unusual to provide for a dissolution or retirement in case a partner shall become insolvent. The word *insolvent*, unless controlled by the context, means unable to pay debts, in the ordinary acceptation of that phrase. A person may therefore be insolvent although his assets, if all turned into money, might enable him to pay his debts in full, (*i*) and although he has not been adjudicated bankrupt or compounded with his creditors. (*k*) But a person is not deemed insolvent merely because he keeps renewing a bill which he cannot conveniently meet. (*l*)

**Giving notice where one partner is insane.**—A clause enabling any partner to determine the partnership by giving notice to the others may be acted on although one of the firm has become insane, for the partner serving the notice is not bound to find understanding for him who is served. (*m*)

**\*Withdrawal of notice.**—A notice once given [\*426] cannot be withdrawn except by consent. (*n*)

**Informal notice.**—A notice to dissolve on a given day of the week and a given day of the month is bad if there is any mistake in either date; *e. g.*, a notice to dissolve on Monday, the 9th, is bad if the 9th falls on Friday. (*o*)

(*h*) See *Anderson v. Anderson*, 25 Beav. 190, which must not be considered as an authority for the doctrine that the court will not hold partners to their articles. The notice to dissolve, in that case, was given six months after the commission of the act complained of, and not on account of such act, but in consequence of other disputes.

(*i*) See *per Le Blanc, J.*, in *Bayly v. Schofield*, 1 M. & S. 338.

(*k*) See *Parker v. Gossage*, 2 C. M.

& R. 617, and *Biddlecombe v. Bond*, 4 A. & E. 332, in which it was held that “insolvent” had not the technical meaning of having taken the benefit of the acts for the relief of insolvent debtors.

(*l*) *Cutten v. Sanger*, 2 Y. & J. 459. And see *Anon.* 1 Camp. 492.

(*m*) *Robertson v. Lockie*, 15 Sim. 285.

(*n*) *Jones v. Lloyd*, 18 Eq. 265.

(*o*) *Watson v. Eales*, 23 Beav. 294.

**Dissolution to be by deed.**— In a case where it was provided that the dissolution should be by deed it was held that a submission by deed of all matters in dispute between the partners, and an award under seal, made upon that submission, dissolving the partnership, had the effect of dissolving it, although nothing was said about dissolution in the submission. (*p*)

**Signing notices of dissolution.**— When power is given to retire or dissolve the firm, or to expel a partner from it, power should also be given to any partner to sign, in the name of himself and copartners, a notice of dissolution for insertion in the “Gazette.” (*q*)

**13. Powers of expulsion.**— In order that an objectionable partner may be summarily got rid of, clauses are sometimes inserted providing for expulsion in certain events. The court cannot control the exercise of a power to expel if it is exercised *bona fide*. (*r*) But all clauses conferring such a power are construed strictly, on account of the abuse which may be made of them, and of the hardship of expulsion; and the court will never allow a partner to be expelled if he can show that his copartners, though justified by the wording of the expulsion clause, have, in fact, taken advantage of it for base and unworthy purposes of their own, and contrary to that truth and honor which every partner has a right to demand on the part of his copartners. In *Blisset v. Daniel* (*s*) the expulsion clause was as follows:

“That it shall be lawful for the holders of two-thirds or more of the shares for the time being from time to time to expel any partner, by giving \*to or leaving for him, at his then or last place of abode in England or Wales, a notice in writing under their hands of such expulsion, which, in such event, shall operate from and at the

(*p*) *Hutchinson v. Whitfield*, 14 Ch. D. 471; *Steuart v. Gladstone*, 10 id. 626.

(*q*) See *Troughton v. Hunter*, 18 Beav. 470. The court will, however, compel a partner to do this on a dissolution. *Hendry v. Turner*, 32 Ch. D. 355.

(*r*) *Russell v. Russell*, 14 Ch. D. 471; *Steuart v. Gladstone*, 10 id. 626.

(*s*) *Blisset v. Daniel*, 10 Ha. 493. See, also, *Wood v. Woad*, L. R. 9 Ex. 190.

time of the giving or leaving such notice, and shall be in the following form, namely, 'We do hereby give you notice that you are hereby expelled from the partnership carried on under the firm of *John Freeman and Copper Company*. Witness our hands this — day of —.' "

The power, therefore, was in the most general terms; no reasons for its exercise were required to be given; no meetings or deliberations were declared to be necessary before serving the notice. The holders of two-thirds of the shares signed a notice in the form prescribed and served it on the partner whom they desired to expel. They gave no reasons, and relied upon the clause set out above. But it appeared that they desired to get rid of their copartner, not because so to do was in any sense for the benefit of the firm in a mercantile point of view, but because he objected to the appointment of one of his copartner's sons as co-manager with his father. It further appeared that the offended father had complained to the other partners behind the back of the expelled partner, and had prevailed upon them to sign the notice, intimating that either the expelled partner or himself must leave the firm. The expelling partners, having resolved to exercise the power, induced the expelled partner to sign certain accounts, in order that he might be bound by them when expelled. Their intention to expel him was, however, concealed until after the accounts were signed; and the notice of expulsion, which gave him the first intimation of any design to get rid of him, was not served until he had signed the accounts. Under these circumstances the court declared that the notice of expulsion was void and restored the expelled partner to his rights as a member of the firm.

**Opportunity for explanation.**—Having regard to the principles acted upon in cases of this description, it is conceived that a power to expel for misconduct cannot be safely acted upon until the delinquent partner has had an opportunity of explaining his conduct. (*t*)

(*t*) See the judgment in *Blisset v. Board of Works*, 14 C. B. N. S. *Daniel*, and *Cooper v. Wandsworth* 180.

**All must concur.**—A power of expulsion cannot [\*428] be exercised without the concurrence of *all* those whose concurrence may be required by the articles. (*u*)

**Notice of expulsion.**—A notice of expulsion under one clause cannot, if invalid, operate as a notice of dissolution under some other clause. (*x*)

In *Smith v. Mules* it was provided, in effect, that, if a partner should do or omit to do certain things, the others should be at liberty to dissolve the partnership by giving notice to the partner who should offend; and that upon giving such notice the partnership should cease and be dissolved in the same manner, and with the same consequences, as if it had been determined by the voluntary retirement of the offending partner. The firm consisted of three partners, A., B., and C., who was B.'s son. B. was guilty of conduct for which he might have been compelled to retire. A. gave B. and C. notice that he dissolved the partnership under the clause above referred to. C., however, had done nothing rendering it competent for A. to expel him. It was therefore decided: 1, that A. had no right to expel B. without C.'s concurrence; 2, that A. had no right to dissolve the firm, so far as C. was concerned; 3, that C. having adopted the notice after it was given, A. could not treat the partnership as continuing; and 4, that the dissolution actually brought about was not a dissolution provided for by the articles, and did not, therefore, entail the consequences of a dissolution under them. (*y*)

**Power to expel in case of omitting to do things.**—When a power of expulsion is given in the event of a partner omitting to do certain things, *e. g.*, entering in the partnership book all moneys he may receive on account of the

(*u*) See *Steuart v. Gladstone*, 10 Hart v. Clarke, 6 De G. M. & G. Ch. D. 626; *Smith v. Mules*, 9 Ha. 232, and *Clarke v. Hart*, 6 H. L. C. 556. 633.

(*x*) See *Smith v. Mules*, 9 Ha. 556; (*y*) *Smith v. Mules*, 9 Ha. 556.

partnership, the power will not, as a rule, be exercisable, unless the omission was a studied omission. (z)<sup>1</sup>

As to power to expel in case a partner becomes insolvent, see *ante*, p. 425.

A power to expel contained in articles for a partnership for a term of years is not exercisable after the term has expired, \*although the partnership may have [\*429] been continued on the old footing. (a)

**14. Valuation of shares.**<sup>1</sup>—Having provided for the events upon which a partnership is to cease, the next point is to specify the method in which its affairs are to be wholly or partially wound up.

(z) See *Smith v. Mules*, 9 Ha. 556.

<sup>1</sup> The mere failure of one partner to pay his share of the debts or expenses does not forfeit his right to the common property. *Kimball v. Gearhart*, 12 Cal. 27.

A partner by failing to contribute his share of the partnership fund does not, in ordinary cases, forfeit the interest which he already has in the firm, especially where no extraordinary emergency exists requiring it. *Piatt v. Oliver*, 3 McLean, 27.

An association or partnership cannot exclude or expel a member for refusing to do an act not required by the constitution or laws when he joined and entirely forego to the purposes of the association. *Gorman v. Russell*, 14 Cal. 531.

Where personal property belongs to the members of a voluntary unincorporated association, especially for public and not for private purposes, if a member abandons the association he thereby abandons his interest in such property, and those who remain are entitled to such interest. *Curtiss v. Hoyt*, 19 Conn. 154.

An agreement in copartnership articles provided that, after each partner had provided the sums of money stipulated in the articles, any further sums required should be raised by joint efforts and on the partners' joint credit; and further, that the party violating the agreement should forfeit thereby his interest in the concern, at the option of the other party, and be ejected from the firm, the other partner refunding to him the sum he advanced. *Held*, that the mere fact that the joint responsibility of the firm was insufficient to raise the requisite funds gave one partner no right to declare the share of the other forfeited. *Patterson v. Silliman*, 28 Pa. St. 304.

(a) *Clark v. Leach*, 32 Beav. 14, and 1 De G. J. & Sm. 409. See *Neilson v. Mossend Iron Co.* 11 App. Ca. 298.

<sup>1</sup> Articles of copartnership respecting the inventory in valuing of certain plant, etc., and crediting of the same to one of the partners, construed. *Worthington v. MacDonald*, 9 Can. Supr. Ct. 327.

**General rule where the articles cannot be acted on.—**

Where the articles have prescribed no method of winding up, or where the method prescribed cannot be carried into effect, then, unless the partners can come to some agreement as to what is to be done, there must, as a general rule, be a conversion of all the partnership property into money; and this money, after payment of the partnership debts, must be divided amongst the partners in the shares in which they may be entitled to it. (b)

**Agreements for fair division.**—An agreement that on a dissolution the partnership property shall be fairly and equally divided after payment of its debts has been held to mean that the property shall be sold, and that the money produced by the sale shall be divided after the debts have been paid. (c)

**Methods of avoiding sale.**—In order to prevent the ruin consequent on a sale when a partnership happens to be dissolved, several devices are had recourse to. The simplest is to specify in the articles a sum at which the share of an outgoing or deceased partner may be taken by his copartners. (d) But it is seldom possible to fix a sum beforehand, and consequently such a provision is not common. It is more usual to stipulate that the share shall be taken to be of the value appearing in the last-signed account, and be paid with the addition of subsequent profits, or with interest at a certain rate in lieu of such profits. If a stipulation to this effect

is made, and the accounts have been regularly taken [\*430] and signed, or regularly taken but not signed, (e) \*so that the shares of the partners appear from the accounts as intended, all parties must abide by the stipula-

(b) See *Cook v. Collingridge*, Jac. 607; *Kershaw v. Matthews*, 2 Russ. 62; *Wilson v. Greenwood*, 1 Swanst. 482. That this rule is not to be rigorously applied, see *Pettyt v. Janeson*, 6 Madd. 146, and *Simmons v. Leonard*, 3 Ha. 581, noticed *infra*, p. 431.

(c) *Rigden v. Pierce*, 6 Madd. 353; *Cook v. Collingridge*, Jac. 607.

(d) Effect was given to such a provision in *Essex v. Essex*, 20 Beav. 442.

(e) As in *Ex parte Barber*, 5 Ch. 687; *Coventry v. Barclay*, 3 De G. J. & Sm. 320.



tion, (*f*)<sup>1</sup> although difficulties may arise as to the true construction of the articles. (*g*)

**Effect of not keeping accounts as agreed.**— But if, as frequently happens, the accounts intended to be taken and signed have not been taken, or have been taken irregularly, so that the last-signed account is not so late a one as is contemplated by the articles, in such a case the account must be made up to the latest date at which it ought to have been made up, regard being had to the articles and the practice of the partners; and the share of the outgoing or deceased partner must be taken at its value, as the same appears by the account so taken.

Thus, in *Pettyt v. Janeson*, (*h*) the articles provided that the partnership accounts should be taken every 25th of March, and that if either partner died during the continuance of the partnership his interest should be regulated by the last yearly settlement, and what should then appear to be due to him should be paid to his executors, with five per cent. interest, instead of subsequent profits. For some time the partnership accounts were regularly settled every 25th

(*f*) *King v. Chuck*, 17 Beav. 325; next of kin. *Maddock v. Astbury*, *Gainsborough v. Stork*, Barn. 312; 32 N. J. Eq. 181. .  
and the cases in the last note.

<sup>1</sup> By articles of partnership, M. and A. stipulated that at the end of three months after the death of either of them a valuation of all their partnership assets and property should be made according to the amount of capital invested; and that the survivor should have one year thereafter to take and pay the value of such share to the legal representatives of the decedent. One partner (A.) died intestate. *Held*, that M. was entitled to specific performance of the contract, which of itself constituted an equitable conversion of the real estate, and that the proceeds must be divided among the intestate's

(*g*) A provision that a share shall be paid for as the same stood at the time of the last account means as it stood in the partnership books. See *Blisset v. Daniel*, 10 Ha. 493, p. 511. See, as to clauses of this description, *Coventry v. Barclay*, *ante*, p. 421; *Ex parte Barber*, *ubi supra*; and *Browning v. Browning*, 31 Beav. 316, as to interest and subsequent drawings out. As to the calculation of interest where the share is to be paid out, with interest, by instalments, see *Ewing v. Ewing*, 8 App. Ca. 822. As to good-will, *Steuart v. Gladstone*, 10 Ch. D. 626, and *infra*.

(*h*) 6 Madd. 146.

of March; but afterwards they were made up very irregularly, and often not for sixteen or eighteen months. A partner died in February, 1813. The last account prior to his death was settled on the 5th of November, 1811. The executors insisted that as there had been no annual settlement, as contemplated by the articles, they were entitled to a share of the profits calculated to the time of their testator's death. The surviving partner, on the other hand, contended that all they were entitled to was the amount of their testator's share, as appearing by the account settled in November, 1811, with interest thereon. But the vice-chancellor observed:

[\*431] \*"That the articles had two plain intentions—that there should be an annual settlement, and that the estate of a deceased partner should receive no profits for the fraction of the year since the last annual settlement. That the settlement of the 5th November, 1811, was to be considered as a settlement substituted by the agreement of the parties in the place of the settlement stipulated for in the articles. That if the testator had died on the 1st October, 1812, it could not have been contended that his estate was to take profits subsequent to the 5th November, 1811, being the last settlement within a year of the death; and if this were to be treated in that case as a settlement, within the spirit of the articles, against the testator's estate, it must be equally considered as a settlement for the testator's estate as a settlement on the 5th November, 1811, which bound each party to come to the next annual settlement on the 5th November, 1812. That the court must act upon that which ought to have been done as if it had been done, and must declare the testator's estate entitled to a share in the profits up to the 5th November, 1812, being the day which ought to have been the last annual settlement before the testator's death."

The same principle was acted upon by Vice-Chancellor Wigram in *Simmons v. Leonard*, (i) although no account having ever been taken between the parties, and the day mentioned in the articles for taking the account not being apparently considered of much importance, the account directed to be taken did not stop at the day at which the last account would have been taken if the articles had been acted on. In *Simmons v. Leonard* the articles provided

(i) 3 Ha. 581.

that a general account and rest should be taken every 31st of December, or on such other day as the partners should agree upon; and that if a partner died during the term his executors should receive payment of his share as ascertained at the last annual rest, with interest thereon, in lieu of subsequent profits; and that his executors should have no right to look into the partnership books. The provision relative to the annual settlement of an account was never acted upon at all. One of the partners died, and the vice-chancellor held that the primary object of all parties was that the death of one of them should not cause a general dissolution and winding up; that this object might be attained although no such account as was contemplated had been taken; that it was absolutely necessary to take an account of some sort, and to let the executors, therefore, look into the partnership books; and that, having regard to the omission of \*the partners to settle any [\*432] account at all, the only account which could be taken was a general account of what was due to the testator at the time of his death for his share of capital and profits.

In *Lawes v. Lawes*, (*k*) the articles provided for taking half-yearly accounts, and that on the death of a partner his share should be taken at the amount settled by the last half-yearly account. The accounts were in fact settled once a year only; but on the death of a partner it was held that his share was not to be taken at the amount shown by the last annual account actually taken, but at the amount shown by an account to be taken at the end of the half-year next before his death, as stipulated by the articles.

These cases not only afford good illustrations of the rule that in construing partnership articles regard must be had to the conduct of the partners, even where a circumstance has arisen of which the partners had no previous experience, (*l*) but they also show that this rule will not be applied unfairly, and further that the rule that there must be a sale

(*k*) 9 Ch. D. 98.

1 Swanst. 460; *Coventry v. Barclay*,

(*l*) See, too, *Jackson v. Sedgwick*, and *Ex parte Barber*, ante, note (*e*).

of the partnership property whenever there is a dissolution, unless the articles provide for some other method of dealing with it, and the provisions in the articles are capable of being rigorously carried out, must be taken with considerable qualification. (*m*)

**Taking share at a valuation.**—It is not unusual to stipulate that the share of an outgoing or deceased partner shall be taken by the continuing or surviving partners at a valuation; and although as a rule specific performance of an agreement for sale at a valuation will not be decreed unless the valuation has been made, (*n*) yet where persons enter into partnership upon certain terms, one of which is that on a dissolution one partner shall take the share of another at a valuation, the court will, on a dissolution under the articles, enforce such a stipulation, and if necessary [\*433] itself ascertain the value of the share. (*o*) It

has, however, been held that an agreement for a sale at a price to be fixed by valuers, one to be appointed by the seller and the other by the purchaser, or, in case the valuers differ, by an umpire, does not enable the court to appoint an umpire if the valuers will not do so, and are yet themselves unable to fix a price. (*p*) Moreover, *Wilson v. Greenwood* (*q*) throws considerable doubt on the validity, in the event of a bankruptcy, of an agreement that the share of a bankrupt partner shall be taken at a valuation by his copartners.

**15. Introduction of new partner in lieu of a dead or retired partner.**<sup>1</sup>—It is a common provision in partnership

(*m*) See, as to rule referred to, *ante*, p. 429.

(*n*) See *Vickers v. Vickers*, 4 Eq. 529, a case between partners, and the authorities there cited. The rule does not apply to a valuation of things which are accessories to the main purchase. See *Jackson v. Jackson*, 1 Sm. & G. 184.

(*o*) *Dinham v. Bradford*, 5 Ch. 519. See, as to contracts to sell at

a fair valuation, as distinguished from a valuation to be made by particular individuals, *Fry on Spec. Perf.* 154, 2d ed.

(*p*) *Collins v. Collins*, 26 Beav. 306. And see *Vickers v. Vickers*, 4 Eq. 529.

(*q*) 1 Swanst. 471. See, also, *Whitmore v. Mason*, 2 J. & H. 204.

<sup>1</sup> A business manager of a firm cannot bind the firm by the admis-

articles that on the death of a partner his executors, or his son, or some other person, shall be entitled to take his place. The effect of any such provision must of course depend on its words; but speaking generally it may be said —

1. That clauses of this kind, although they bind the surviving partners to let in the person nominated, (*r*) do not bind him to come in, but give him an option whether he will do so or not; (*s*)

2. That before making up his mind he is entitled to make himself acquainted with the state of the partnership affairs, although he is not entitled to have its accounts formally taken; (*t*)

3. That if he is desirous of coming in, he must comply strictly with the terms upon which alone he is entitled to do so; (*u*)

\*4. That if he declines to come in, and there is [\*434] no provision as to what is then to be done, the partnership must be dissolved and wound up in the usual way. (*v*)

**Person entitled to succeed will be assisted in equity.—**

As a general rule, and excluding cases of agency, an agreement between two persons cannot be enforced against either of them by a third person, even although such third person was intended to derive a benefit from the agreement. (*x*) In *Page v. Cox* it was attempted to apply this

sion of a partner into the firm. *Love v. Payne*, 73 Ind. 80.

(*r*) In *Wainwright v. Waterman*, 1 Ves. Jr. 311, a person was declared entitled to be admitted, although those with whom that question rested were divided in opinion. But in *Milliken v. Milliken*; 8 Ir. Eq. 16, it was held that a person who is to be let in, provided he conducts himself to the satisfaction of the survivors, is without remedy if they will not admit him.

(*s*) *Pigott v. Bagley*, McCl. & Y. 569; *Madgwick v. Wimble*, 6 Beav.

495; *Downs v. Collins*, 6 Ha. 418; *Page v. Cox*, 10 Ha. 163. See, too, *Pearce v. Chamberlain*, 2 Ves. Sr. 33.

(*t*) *Pigott v. Bagley*, McCl. & Y. 569.

(*u*) *Holland v. King*, 6 C. B. 727; *Brooke v. Garrod*, 3 K. & J. 608, and 2 De G. & J. 62; *Milliken v. Milliken*, *supra*, note (*r*). See *Ex parte Marks*, 1 D. & Ch. 499.

(*v*) *Kershaw v. Matthews*, 2 Russ. 62; *Downs v. Collins*, 6 Ha. 418; *Madgwick v. Wimble*, 6 Beav. 495.

(*x*) See *Colyear v. The Countess*

rule to an agreement between two partners that on the death of one his widow should succeed him. One of the partners was dead; it was contended that his widow had no right to succeed. But it was held that the rule in question had no application to such a case; that the articles had created a valid trust in favor of the widow; and that she was entitled to come to the court for a decree for the execution of such trust. (y)

**Cases of settled share.**—In a case where articles provided that, in the event of the death of a partner during the term for which the partnership was intended to last, his share should go to his widow for life, and after her death to his children, and in default of children to his widow's executors, administrators or assigns, it was held that the children of a partner who had died leaving a widow did not take any vested interest in the partnership assets during her life. (z)

**Appointment of successor.**—In another case partnership articles provided that on the death of a partner the survivor should carry on the business for the benefit of himself and such person as the other should by will appoint, and, in default of appointment, for the benefit of his widow, or (if she should be dead) for the benefit of his children, and in default of children for the benefit of his executors or administrators; and that such person, or the said widow, children, executors or administrators, should stand in the place of the deceased, and be entitled to the same share in, and have the same control over, the partnership trade and assets as the deceased would himself have been entitled to if \*living. It was held that this was not, technically speaking, a power of appointment, and that consequently a partner could bequeath his share by a will which did not allude either to the power or to the partnership. (a)

of Mulgrave, 2 Keen, 81; *Re Em-* also, *Murray v. Flavell*, 25 Ch. D.  
press Engineering Co. 16 Ch. D. 89; *Dale v. Hamilton*, 2 Ph. 266.  
125. (z) *Balmain v. Shore*, 9 Ves. 500.

(y) *Page v. Cox*, 10 Ha. 163. See, (a) *Ponton v. Dunn*, 1 R. & M.

**Position of incoming partner.**— When a person has been admitted into an existing firm, and no express agreement has been made as to his rights and liabilities, the inference is that as between themselves his position is the same as that of the other partners.<sup>1</sup> If they are bound by existing articles he will be bound by the same articles, if his conduct justifies the conclusion that he has assented to them; and if any special agreement is made with him, it will be regarded as incorporated with any previous agreement between the older partners, although so far as the two agreements may be inconsistent the latest will prevail. (*b*) If, indeed, the incoming partner has no knowledge of any prior agreement between the others, he cannot be bound thereby; (*c*) for nothing that he can have done can be regarded, under these circumstances, as evidence of any assent thereto on his part; and it is upon such presumed assent that the rule in question is founded.

**16. Annuities to widows, etc.**— Sometimes it is agreed that if a partner dies the survivor shall pay an annuity or a share of the profits to his widow. There is now no difficulty in framing a clause of this sort without making the widow a partner or a *quasi*-partner by virtue of her participation in profits; (*d*) and after her husband's death she can enforce payment of the provision intended for her. (*e*)

402. See, also, *Beamish v. Beamish*, Ir. Rep. 4 Eq. 120, where a bequest of a share of residue was held not to amount to a nomination of a successor.

<sup>1</sup> Persons who succeed to the interest of some of the members of a firm, and are recognized and treated as partners by the remaining original members, the latter continuing the business, in conjunction with them, under the original agreement, become members of the firm under the original articles. *Meaher v. Cox*, 37 Ala. 201; S. C., Ala. Sel. Cas. 156.

Old articles of copartnership are not binding upon the new firm formed upon the admission of a new member, except so far as they may be adopted by the new firm in the management of its business. *McCall v. Moss*, 112 Ill. 493.

(*b*) See *Austen v. Boys*, 24 Beav. 593, and 2 De G. & J. 626.

(*c*) *Ibid.*

(*d*) See, as to this, *ante*, p. 35.

(*e*) See *Murray v. Flavell*, 25 Ch. D. 89; *Page v. Cox*, 10 Ha. 163, *ante*, p. 434.

**Annuity payable out of profits and none made.**— If the annuity is made payable out of the profits, and the business is carried on and no profits are made, no annuity will be payable. So if the surviving partner has an option to pay either an annuity or a share of the profits, and there should be no profits, he will not be bound to pay anything; for, *ex*

*hypothesi*, it is competent for him to elect to pay out [\*436] of the \*profits, and his right to make this election in no way depends on their amount. (*f*) Moreover, in

construing a provision giving a widow of a deceased partner a share of the profits, the partnership which, strictly speaking, determined when her husband died, is regarded as continuing, and the profits which she is to share must be ascertained on that principle. They ought not to be calculated as if the returns yielded by the new business had not to be applied in liquidating the demands on the old firm. (*g*)

**Annuity payable until eviction.**— In *Holyland v. De Mendez*, (*h*) a continuing partner gave a bond conditioned to be void on payment of an annuity, or on being without his own default dispossessed of the partnership property assigned to him. It was held that the annuity did not cease on the bankruptcy of the continuing partner; dispossession by his assignees not being such a dispossession as was contemplated in the bond.

**Effect of discontinuing business.**— An agreement to pay an annuity out of profits involves an obligation not wilfully to prevent the earning of profits; and if, therefore, the person who has to pay the annuity wilfully ceases to carry on business he becomes liable to an action for damages. (*i*) In order, however, to provide as far as possible against any attempt to defeat the annuity by discontinuing the business, it is desirable that the partner continuing the business should covenant not only that he will carry on the business

(*f*) *Ex parte Harper*, 1 De G. & J. 180.

(*g*) *Ibid.*

(*h*) 3 Mer. 184.

(*i*) *McIntyre v. Belcher*, 14 C. B. N. S. 654; *Telegraph Dispatch Co. v. McLean*, 8 Ch. 658. Compare *Rhodes v. Forwood*, 1 App. Ca. 256.



and pay the annuity, but that he will not transfer the business or take in any fresh partner without procuring from the transferee or new partner a similar covenant on his part. (*k*)

**17. Prohibitions against continuing in business.**<sup>1</sup>—A subject upon which it is always desirable to make some express agreement is the extent to which a retiring partner shall be restrained from commencing business on his own account and in opposition to the continuing partner.

**\*Rule where there is no prohibition.**—In the [\*437] absence of any agreement upon the subject, a retiring partner is as much at liberty to set up for himself, in opposition to the firm he has quitted, as he would be if he had never belonged to it; and on a general dissolution of partnership all the partners are at liberty to commence business in opposition to each other, as freely as if they had never been partners, unless they have entered into some agreement not to do so. A dissolution *per se* obliges no partner to retire from business, or to refrain from seeking a livelihood in the manner in which he has been accustomed so to do, and in the neighborhood where he is known. (*l*)<sup>2</sup>

**After sale of good-will.**—As will be seen presently, even a sale by an outgoing partner of all his interest in the part-

(*k*) A purchaser of the business with notice of such a covenant would take subject to it. See *Werderman v. Société Générale d'Electricité*, 19 Ch. D. 246.

<sup>1</sup> A clause in a copartnership agreement, wherein each partner agrees not to transact on his individual account, within twenty miles of the village in which such partnership is to do business, the kind of business for the transaction of which it is created, is unobjectionable. *Fairbank v. Leary*, 40 Wis. 637.

(*l*) See *Dawson v. Beeson*, 22 Ch. D. 504; *Farr v. Pearce*, 3 Madd. 78;

*Davies v. Hodgson*, 25 Beav. 177; and the next head, No. 18, Good-will.

<sup>2</sup> On the dissolution of a partnership whose business is the publication of a periodical paper, the good-will of the paper is assets, but one partner will not be enjoined from carrying on the same business (in the absence of any covenant or restriction), unless he does it in a way which would be an infringement according to the analogies of the law of trade-marks. *Dayton v. Wilkes*, 17 How. Pr. 510. See *post*, Good-will.

nership business, including the good-will thereof, does not preclude him from setting up a new business in opposition to the continuing partners;<sup>1</sup> but it does preclude him from so doing in the name of the old firm and from representing himself as continuing the business sold. (*m*) But an agreement by an outgoing partner not to carry on business in rivalry with his late copartners may be implied even where not distinctly expressed. (*n*)

**Agreement not to carry on business enforced.**—An agreement by a retiring partner not to commence business in opposition to his late partners will be enforced, if the restriction imposed upon him is not unlimited, both as regards time and distance, and is not unreasonable, having regard to the nature of the partnership business. (*o*)<sup>2</sup> Thus,

<sup>1</sup> *White v. Jones*, 1 Robt. (N. Y.) 321.

On the retirement of a partner from a firm his copartners continued the business at the old place, and the retiring partner embarked in the same line of business and on the same side of the same street, and within about fifty feet from the old store, and put up a sign, bearing in the first line his own name, in the second line the words "of the late firm of," and in the third the name of the old firm, the second line being in letters of good size, yet but little more than a third the height of the letters in the third line. *Held*, that an injunction should issue to restrain this use of the firm name. *Smith v. Cooper*, 5 Abb. New Cas. 374.

Abraham Bininger Clark, who had been a partner in the firm of A. Bininger & Co., usually writing his name as Abm. B. Clark, continued a similar business on his own account, after the dissolution of that firm, and put up his name as A. Bininger Clark, successor to

A Bininger & Co. *Held*, that he might be restrained by injunction from the use of such a style. *Bininger v. Clark*, 10 Abb. Pr. N. S. 264.

(*m*) *Churton v. Douglas, Johns*. 174, noticed *infra*, p. 441.

(*n*) See *infra*, p. 442.

(*o*) See, generally, as to covenants not to carry on business, *Mitchell v. Reynolds*, 1 Smith's L. C.; also the useful table appended to *Avery v. Langford, Kay*, 663. As to whether such covenants can be reasonable, if unlimited both as to time and space, see *Davies v. Davies*, 36 Ch. D. 359, where the covenant was unlimited "so far as the laws allows," and was held to be too uncertain to be enforced, and also to be personal to the covenantees. In *Palmer v. Mallet*, 36 Ch. D. 411, the covenant was joint in form, but was held to be joint and several as regards the covenantees. Distances are measured as the crow flies. *Duigman v. Walker, Johns*. 446; *Mouflet v. Cole*, L. R. 7 Ex. 70, and 8 Ex. 32.

<sup>2</sup> See *Angier v. Webber*, 14 Allen,

in *Williams v. Williams*, (*p*) the defendant, who had been in partnership \*with the plaintiffs in running [\*438] coaches between Reading and London, sold his share in the business to them, and covenanted not to run any

211; *Shearman v. Hart*, 14 Abb. Pr. 358; *Butler v. Barleson*, 16 Vt. 176; *Ropes v. Upton*, 125 Mass. 258.

Partners dissolved their partnership and the retiring member agreed not to be concerned in any way in the kind of business carried on by the firm for five years within the city where their business was established, nor interfere with any agency already established, nor establish any similar agency that might interfere with the business of the firm as before carried on, whether in said city or elsewhere. *Held*, that so far as this covenant restrained the retiring member from engaging within said city in the business carried on by the firm, for a limited time, it was not in general restraint of trade, and therefore legal and proper, and that the remainder was a general restraint of trade, and therefore void. *Thomas v. Miles*, 3 Ohio St. 274.

Where partners, before dissolution, sold their stock of goods and the "good-will" of their business, and stipulated in the contract of sale that they, or either of them, would not again enter into the same business in that locality, *held*, that either or both of them were liable for a breach thereof by either one of them after dissolution. *Stark v. Noble*, 24 Iowa, 71.

Upon the sale of a business and

good-will, it was agreed that the purchaser should be at liberty to use the name or style of the vendors for a period of two years. After the expiration of the two years the vendors recommenced business under a similar name or style to that under which they had carried on the business under which they had sold, and also solicited their former customers. *Held*, that they must be restrained from soliciting or in any way endeavoring to obtain the custom of their former customers. *Seemle*, that they might also be restrained from dealing with their former customers. *Genese v. Cooper*, 22 Alb. Law Jour. 170.

N. & C. purchased the grain elevator of H., with the good-will pertaining thereto, and H., at the same time, agreed not to engage in the grain business in the same place. Subsequently N. & H. and another formed a copartnership for the prosecution of the same business for one year. *Held*, that the formation of partnership was inconsistent with the prior undertaking of H., and that at the expiration of the partnership he was absolved therefrom. *Norris v. Howard*, 41 Iowa, 508.

The plaintiff and defendant being copartners, the latter on January 24, 1876, sold his interest to the former, taking his notes for \$4,000, payable at various times through a

coach between Reading and London, or so as to injure the business of the plaintiffs; and this covenant was enforced in equity. So, in *Tallis v. Tallis*, (*q*) the court of queen's bench upheld a covenant entered into by a retiring member of a firm of booksellers not to carry on the canvassing trade in London, nor within one hundred and fifty miles of the general postoffice, nor in, nor within fifty miles of, Dublin or Edinburgh, nor in any town in Great Britain or Ireland in which the continuing partner or his successors might at the time have an establishment.

**Consideration.**—An agreement entered into when a partnership is formed, to the effect that a retiring partner shall not carry on the business carried on by the firm, cannot be invalid for want of consideration. (*r*)

An agreement with a bankrupt to take his son into partnership, and to employ the bankrupt, is a sufficient consideration for an agreement by him not to carry on business in competition with the firm. (*s*)

**Solicitors' papers, etc.**—In framing articles of partnership between solicitors, provision should always be made respecting the deeds and documents in their possession, but belonging to their clients.

It need hardly be observed that no agreement which the solicitors may make between themselves will prejudice their clients. Subject to any question of lien, the clients are en-

period of more than three years, and transferred the good-will of the business to the plaintiff, and agreed not to engage in it himself at B. for a term of ten years from date. "This last agreement" (repeating it) "to be binding on me (defendant) only in case the \$4,000 which is the consideration hereof is paid according to the said H.'s agreement to pay the same and at the time agreed upon." Nearly three years thereafter, the plaintiff, having paid at maturity all of his notes

except two, which had not matured, brought this action for the violation of the defendant's agreement not to engage in the business. *Held*, that the payment of the whole \$4,000 was not a condition precedent to its maintenance. *Hunt v. Thibbetts*, 70 Me. 221.

(*q*) 1 E. & B. 391. See, too, *Atykins v. Kinnier*, 4 Ex. 776; *Reynolds v. Bridge*, 6 E. & B. 528.

(*r*) *Per* Lord Cranworth, in *Austen v. Boys*, 2 De G. & J. 626.

(*s*) *Clarkson v. Edge*, 33 Beav. 227.

titled to have their deeds and documents, and all drafts and copies thereof, paid for by them, delivered up on request. (*t*) They have, moreover, a right to the joint assistance of all the members of the firm employed by them; and although, if the firm is dissolved, a client cannot insist that the partners shall continue to act as his solicitors, it is clear that they cannot, without his consent, turn him over to one of themselves; (*u*) \*nor act against him as if he [\*439] had never been a client. (*x*) The dissolution operates as a discharge of the client by the solicitors, and the client is, thereupon entitled, subject to any question of lien, to have his deeds and papers delivered up to him. (*y*)

But, as between the solicitors themselves, it is competent for them to agree that, if they dissolve partnership, the clients of the old firm, and all their deeds and papers, shall be divided amongst the partners, or belong solely to the partner who continues to carry on the business of the firm; and such an agreement will be enforced. (*z*) If no such agreement is come to, each partner may, after a dissolution, do his best to induce the old clients to continue him as their sole solicitor.

**18. Good-will.**—In connection with the subject considered under the last head it is necessary to allude to the good-will of a trade or business.

**Nature of good-will.**—The term good-will can hardly be said to have any precise signification.<sup>1</sup> It is generally used to denote the benefit arising from connection and reputa-

(*t*) *Ex parte* Horsfall, 7 B. & C. 383. See, however, *Davidson v. Napier*, 1 Sim. 297.

(*u*) *Cook v. Rhodes*, 19 Ves. 272, note.

(*x*) *Cholmondeley v. Clinton*, 19 Ves. 261.

(*y*) *Griffiths v. Griffiths*, 2 Ha. 587; *Colegrave v. Manley, T. & R.* 400. And see *Vaughan v. Vanderstegen*, 2 Drew. 409; and *ante*, p. 120.

(*z*) *Whittaker v. Howe*, 3 Beav.

383. See, however, *Davidson v. Napier*, 1 Sim. 297.

<sup>1</sup>The "good-will" of an establishment rests in the probability that its old customers will continue their custom and commend it to others. *Myers v. Kalamazoo Buggy Co.* 54 Mich. 215. See, also, *Chittenden v. Witbeck*, 50 Mich. 401; *Hegeman v. Hegeman*, 8 Daly, 1.

The good-will of a millinery business, which depends largely upon

tion; and its value is what can be got for the chance of being able to keep that connection and improve it. Upon the sale of an established business its good-will has a marketable value, whether the business is that of a professional man or of any other person. (a) But it is plain that good-will has no meaning except in connection with a continuing business; (b) it may have no value except in connection with a particular house, and may be so inseparably connected with it as to pass with it under a will or deed without being specially mentioned. (c) In such a case [\*440] the good-will \*increases the value of the house; but the value of the good-will of any business to a purchaser depends, in some cases entirely, and in all very much, on the absence of competition on the part of those by whom the business has been previously carried on.

Now it has just been seen that there is no obligation on

the skill of one of the partners, is no more the property of the co-partnership or the subject of sale than would be the good-will of an attorney's business or that of an artist. *McCall v. Moschcowitz*, 10 N. Y. Civ. Proc. 107; following *Van Dyke v. Jackson*, 1 E. D. Smith, 419.

A partner who, upon dissolution, purchases the good-will, secures merely the right to conduct the old business at the old stand, and, in the absence in the contract of dissolution of stipulations to the contrary, the retiring partner may lawfully establish a similar business even in the neighborhood, and by advertisement, circular, card and personal solicitation invite the public generally, including the customers of the old firm, to come there and purchase of him; but trade must be so solicited as not to lead any one to believe that the

machinery offered for sale is manufactured by the partner who purchased the good-will, or that he is the successor of the old firm, or that the owner of the good-will is not carrying on the business formerly conducted by the old firm. *Cottrell v. Babcock Printing Press Mfg. Co.* 6 Atl. Rep. (Conn.) 791; S. C. 2 N. Eng. Rep. 916.

(a) Good-will is property within the meaning of the stamp acts. *Potter v. The Commissioner of the Inland Revenue*, 10 Ex. 147.

(b) See, as to a legacy of good-will, apart from any share in the business, *Robertson v. Quiddington*, 28 Beav. 529.

(c) As in *Blake v. Shaw, Johns*. 732; *Chissum v. Dewes*, 5 Russ. 29; *Ex parte Punnett*, 16 Ch. D. 226; *Pile v. Pile*, 3 Ch. D. 36. And see *per Cotton, L. J.*, in *Cooper v. Met. Board of Works*, 25 Ch. D. 479.

the part of any of the partners to retire from business merely because the partnership between them is dissolved.

**Carrying on business after selling it.**—Further, it is held, although it is certainly an extraordinary doctrine, that if a person sells the good-will of his trade or business, that does not disentitle him from recommencing a similar trade or business in the immediate vicinity of the place where the old one was carried one; (*d*) and, therefore, if it is simply agreed that a partnership shall be dissolved, and that one partner shall buy the other out, and this agreement is carried into effect, the retiring partner will nevertheless be at liberty to recommence business in the old line in the old neighborhood; (*e*) and he may not only advertise the fact, (*f*) but he may also solicit business from, and carry on business with, the old customers and correspondents of the firm. (*g*) But he must not hold himself out as continuing *the* business which he has sold, and must not therefore carry it on in the name in which it was carried on before he sold it. (*h*) At the same time, if that name happens to be his own, it is by no \*means clear that [\*441]

(*d*) *Cruttwell v. Lye*, 17 Ves. 335; *Harrison v. Gardner*, 2 Madd. 198; *Kennedy v. Lee*, 3 Mer. 455; *Shackle v. Baker*, 14 Ves. 468. See, too, *Davies v. Hodgson*, 25 Beav. 177, and *Churton v. Douglas, Johns*. 174. In *Johnson v. Helleley*, 34 Beav. 63, notice of this right was directed by the court to be given in the particulars of the sale of the good-will.

(*e*) See *Kennedy v. Lee*, 3 Mer. 453; *Mellersh v. Keen*, 27 Beav. 236; *Bradbury v. Dickens*, id. 53; *Smith v. Everett*, id. 446, and the next note.

(*f*) *Hookham v. Pottage*, 8 Ch. 91; *Labouchere v. Dawson*, 13 Eq. 322. And see *Cruttwell v. Lye*, 17 Ves. 335.

(*g*) *Pearson v. Pearson*, 27 Ch. D. 145; *Vernon v. Hallam*, 34 id. 748, overruling, as to this, *Labouchere v. Dawson*, 13 Eq. 322; *Ginesi v. Cooper & Co.* 14 Ch. D. 596; and *Leggott v. Barrett*, 15 Ch. D. 306. N. B.—The order against soliciting the old customers was not appealed against in this last case. See, also, *Walker v. Mottram*, 19 Ch. D. 355; *Dawson v. Beeson*, 22 id. 504.

(*h*) *Churton v. Douglas, Johns*, 174; *Hookham v. Pottage*, 8 Ch. 91, where the defendant described himself as P. from H. & P., the old firm, but in a way calculated to deceive.

he could be restrained from carrying on business in that name. (i)

The last propositions are well illustrated by the important case of *Churton v. Douglas*. (k) There two of the plaintiffs, and the defendant, whose name was *John Douglas*, carried on business in partnership under the firm of *John Douglas & Co.*, as stuff merchants at Bradford. The defendant retired from the firm; a new partner was taken in; and the defendant assigned to his old partners and their new partner (being the plaintiffs) all his, the defendant's, share and interest in the old firm and in the goodwill thereof. The plaintiffs continued to carry on the old business under a new name, with the addition *late John Douglas & Co.* The defendant formed a new partnership with three persons who had been in the employ of the old firm, and whom he had enticed to leave the service of its successors and to join him; and he and his new partners commenced business as stuff merchants at Bradford, in a house adjoining the place of business of the old firm; and they did so in the name of *John Douglas & Co.* They further affixed that name to the house they had taken, and sent circulars to the old customers of the old firm, so as to lead them to suppose that the business of that firm was being continued by the defendant and his new partners. On a bill filed by the plaintiffs against the defendant it was held (1) that he was entitled to carry on, by himself or in partnership with others, the kind of business previously carried on by him with his late partners; and (2) that he was entitled so to do in the immediate neighborhood of the place where he and his late partners previously carried on their business. But it was also held (3) that the plaintiffs alone had the right to carry on the business previously carried on by *John Douglas & Co.*; (4) that the plaintiffs had the right to represent themselves as the successors of that firm; (5) that the defendant had no right to represent

(i) See *id.*, and *ante*, book i, ch. 6, § 2.

(k) Johns, 174.



himself as its successor; (6) that he could not acquire such a right by taking other persons into partnership with him; and (7) that although his name was John Douglas he had not, either alone or in partnership with others, the \*right to carry on the old kind of business, in the [\*442] old place, under the old name of *John Douglas & Co.* An injunction was granted accordingly to restrain the defendant from carrying on the business of a stuff merchant at or in the immediate neighborhood of Bradford, either alone or in partnership, under the style *John Douglas & Co.*, or in any other manner holding out that he was carrying on the business of a stuff merchant in continuation of, or in succession to, the business carried on by the late firm of *John Douglas & Co.*<sup>1</sup>

**Implied agreement not to continue in business.**—An agreement by a partner that he will not carry on business in opposition to his late copartners may, however, be implied from some other agreement into which he and they have entered. Thus where two persons became partners as brewers for eleven years, and it was provided in the articles that either of the parties, on giving six months' notice to the other, should be at liberty to *quit the trade and mystery of a brewer*, and that the other should be at liberty to continue the trade on his own account, it was held that

<sup>1</sup> But such sale is not sufficient to preclude the seller from setting up business in his own name. *White v. Jones*, 1 Robt. (N. Y.) 321.

A transfer, by a retiring partner to the other, of "the business connections and patronage belonging to the firm," may be deemed to include the good-will of the concern. *Kellogg v. Totten*, 16 Abb. Pr. 35.

The good-will of a hotel is not transferred by the sale of the furniture and personal property, but the same pertain to, and could not be sold separately from, the lease. *Mitchell v. Read*, 19 Hun, 418.

One partner's share in the good-will of the business of the firm is not a subject of separate sale. The good-will of the business is invisible. When one of the several partners retires from the firm, the good-will remains as an entirety with the continuing partners (subject to any right of the retiring partner to be compensated). Hence a court of equity will not enforce, nor enjoin proceedings at law upon, an agreement for a sale of one-fourth part of a good-will. *Casidy v. Metcalf*, 1 Mo. App. 593.

one of the partners who had retired from the firm after giving notice to the other was not at liberty to continue in the trade at all. (*l*)

**Award disposing of business.**— Again, where, on the retirement of a partner, it was left to an arbitrator to determine what the continuing partner should pay for the good will, and the arbitrator fixed a sum upon the understanding that the retiring partner would not commence a new business in the same street in which the old one was carried on, an injunction was granted restraining the retiring partner from carrying on business in that street, although the award itself was silent upon the point. (*m*)

It follows from the foregoing observations that the goodwill of a valuable partnership business may be practically unsalable and worthless, at least to any one except a former partner desiring to continue the business of the firm. (*n*) It is only so far as good-will has a salable value that it can be regarded as an asset of any partnership; and [\*443] the good-will of a business is frequently of no value at all, except in connection with the place of business. (*o*)<sup>1</sup> This, however, is by no means always the case. The value of the good-will of a newspaper, for example, attaches to its name, and is scarcely, if at all, dependent on the place of publication.

**Good-will assets of the firm.**— The salable value of the good-will of a partnership business, whatever that value may be, must be considered as belonging to the firm, unless there is some agreement to the contrary; and it follows from this —

1. That if a firm is dissolved, and there is no agreement

(*l*) *Cooper v. Watson*, 3 Dougl. Beav. 177, where the good-will was treated as valueless on this very ground.

(*o*) As in *Blake v. Shaw*, Johns. 732. See *ante*, p. 439, note (*c*).

(*m*) *Harrison v. Gardner*, 2 Madd. 198. <sup>1</sup> In *Hegeman v. Hegeman*, 8 Daly, 1.

(*n*) See *Davies v. Hodgson*, 25

to the contrary, the good-will must be sold for the benefit of all the partners, if any of them insist on such sale; (*p*)<sup>1</sup>

2. That so far as is possible, having regard to the right

(*p*) *Pawsey v. Armstrong*, 18 Ch. D. 698; *Bradbury v. Dickens*, 27 Beav. 53, and the cases cited *infra*.

<sup>1</sup> The good-will of a partnership is an important and valuable interest, which the law recognizes and will protect. *Williams v. Wilson*, 4 Sandf. Ch. 405; *Holden v. McMakin*, 1 Pa. Sel. Cas. 270; *Dougherty v. Van Nostrand*, 1 Hoff. Ch. 68.

Where, however, the plaintiff, in an action between copartners for dissolution and accounting, only went into the business for a year in order to establish defendants' credit, etc., and was to and did leave it at the end of the year, *held*, that the good-will of the business should not be included as an asset in the accounting. *McCall v. Moschowitz*, 10 N. Y. Civ. Proc. 107.

Each member of a firm that has been dissolved has a right, unless otherwise provided, to continue in the business in competition with the other so long as neither can be held on the other's contract. *Smith v. Walker*, 57 Mich. 457.

Where S. and H., upon the sale of their business to E., agreed not to do business in a certain place for a certain term, *held*, that commencement of business by one of the partners in said place within said term was not a breach of the agreement. *Elliott v. Stanley*, 7 Ont. 350.

The interest of a retiring partner in the good-will of a partnership business is a sufficient consideration for a promissory note executed

by the remaining partners. *Smock v. Pierson*, 68 Ind. 405.

The interest of each partner in the leases where the firm business is carried on is part of the good-will of the business and is a firm asset. *Spieß v. Rosswog*, 63 How. Pr. 401; S. C. 48 N. Y. Super. Ct. 135.

The good-will of a firm is regarded in equity as part of the assets of a firm. *Bininger v. Clark*, 10 Abb. Pr. N. S. 264.

It will be protected in equity even when the business is removed to another place. *Hegeman v. Hegeman*, 8 Daly, 1.

When a partnership is dissolved the good-will is a part of the assets of the firm, and the court may order it sold or disposed of in such manner as may be deemed most advantageous to the partners, and the court may permit a partner to retain it upon payment of the full value thereof to his copartner. *Sheppard v. Boggs*, 2 N. W. Rep. N. S. 370; S. C. 9 Neb. 258.

The good-will may be sold. *Williams v. Wilson*, 4 Sandf. Ch. 405; *Holden v. McMakin*, 1 Pa. Sel. Cas. 270; *Sheppard v. Boggs*, 9 Neb. 257. And where, after dissolution, continuing partners refuse to take it at a valuation, a court cannot compel them so to do, and it must be disposed of like other partnership effects. *Dougherty v. Van Nostrand*, 1 Hoff. Ch. 68.

Payment for the good-will of a business must be claimed at the time of the transfer of the business; in order to recover for such good-

of every partner to carry on business himself, the court will, on a dissolution, interfere to protect and preserve the good-will until it can be sold; (q)

will it must appear affirmatively that there was a good-will of some value of itself; proof merely that the business is profitable is not enough. *Fay v. Fay*, 4 Cent. R. 241.

As to the construction of a contract for the purchase of good-will in towage business, containing an agreement not to engage directly or indirectly in such business, see *Congdon v. Morgan*, 13 S. C. 190.

To preserve the good-will a receiver may be appointed to carry on the firm business until a sale can be effected. *Marten v. Van Shaack*, 4 Paige, 479.

*Prima facie*, upon the dissolution of a firm, no arrangement having been made as to the good-will of the business, each partner has the right to use the name of the old firm. *Chappell v. Griffith*, 53 L. T. (N. S.) 459; following *Banks v. Gibson*, 34 Beav. 566, and *Levy v. Walker*, 39 L. T. Rep. (N. S.) 654; 10 L. R. Chy. D. 436.

The reservation of the right to do business in his own name or in any other name than that of the old firm does not warrant the retiring partner in holding himself out as a successor of the old firm and printing and circulating bill-heads, cards, and the like, and cal-

culating and intending to deceive the customers of the old firm; and also the offering of special inducements to such customers to trade with him, thereby depriving his successor in whole or in part of the good-will and exclusive use of the firm name. See, also, the measure of damages considered in the same case. *Burckhardt v. Burckhardt*, 42 Ohio St. 474; S. C. 36 id. 261.

Upon the dissolution of a firm one partner filed a certificate and published a notice that its business would be continued by him in the firm name, but it did not appear from the certificate that the co-partnership was within the terms of L. 1854, ch. 400. He did, however, thereafter continue the business in the name of the former firm. *Held*, that by so doing and purchasing goods upon credit in that name he did not become liable to the seller in an action for obtaining such goods by fraudulent representations. *Thompson v. Gray*, 11 Daly, 183.

A partnership trade-mark is a firm asset which can be sold or disposed of on dissolution. If not disposed of each partner has a right to use it if he continues in the business, unless otherwise agreed. *Smith v. Walker*, 57 Mich. 457;

(q) See *Turner v. Major*, 3 Giff. 442, where, however, there was an express agreement for the sale of the good-will. In *Lewis v. Langdon*, 7 Sim. 425, the V.-C., Shadwell, seems to think that a surviv-

ing partner was under no obligation to preserve the good-will. But his opinion was probably influenced by *Hammond v. Douglas*, 5 Ves. 539, which was not then overruled.

3. That if a partner has himself obtained the benefit of the good-will he can be compelled to account for its value,

*Hazard v. Caswell*, 93 N. Y. 259; S. C. 46 N. Y. Super. Ct. 559; 45 Am. Rep. 198.

Upon the dissolution of a partnership one partner conveyed to his former partner, by bill of sale, all his interest in all the partnership property belonging to the firm, meaning thereby "to sell and convey all his interest in the entire assets of the firm." *Held*, that the good-will and trade-marks belonging to the firm passed by said bill of sale. *Hoxie v. Chaney*, 143 Mass. 592.

After the dissolution of a firm either of the late partners may rightfully use the trade-mark of the firm until in some way he has divested himself of that right; and the mere sale to one of the partners by the other partners of their interest in the real estate used for the business and certain specified personal property connected with it, nothing being said about the good-will or the trade-mark, does not pass the trade-mark as an incident to what is sold. *Huwer v. Dannenhoffer*, 82 N. Y. 499.

Where, upon the dissolution of a firm, its assets, including the good-will, are purchased by one of the partners, who continues the business, he may thereafter use the firm name and trade-marks. *Adams v. Adams*, 7 Abb. N. C. 292. See, also, *Burckhardt v. Burckhardt*, 42 Ohio St. 474; S. C. 36 id. 261.

But the sale and assignment of a lease of a bakery, with the tools, fixtures, furniture, etc., etc., together with the good-will of the business of baking then or thereto-

fore carried on by the vendor, with a covenant not to carry on the business in the same city himself, does not confer on the purchaser the right to use the name of the vendor in the conduct of the business at the same place, nor to designate or describe the bakery (by signs placed thereon or otherwise) by the name of such vendor. *Howe v. Searing*, 6 Bosw. 354. See, also, *Gage v. Canada Pub'g Co.* 6 Ont. 68; S. C. 11 U. C. App. 402.

A partnership which is suffered by any one to use his name as a part of the firm style, though it may acquire by such license an exclusive right to the use of the name so long as the partnership continues, cannot upon its dissolution confer the same privilege upon its successor. *Horton Mfg. Co. v. Horton Mfg. Co.* 18 Fed. R. 816.

An injunction lies to restrain partners who have sold their interest in the good-will of a business from carrying on a rival establishment under a name so similar to that of the first as to mislead and draw off business; and the writ lies against all concerned in the new establishment. But it is hardly necessary to interfere with the delivery of mail matter to the latter beyond requiring them to turn over at once to the original firm so much as may have been intended for it. *Myers v. Kalamazoo Buggy Co.* 54 Mich. 215.

An injunction will lie to restrain one person from assuming the name of another's newspaper to impose upon the public and to sup-

i. e., for what it would have sold for, he being himself at liberty to compete in business with the purchaser. (r)<sup>1</sup>

**Good-will in cases of death.**—In the event of dissolution by death it has been said that the good-will survives, and there is a clear decision to this effect. (s) But this is not in accordance with modern authorities; they are wholly opposed to the notion that the value of the good-will, as such, belongs to the survivor. (t)<sup>2</sup> It undoubtedly may happen that the survivor may obtain the benefit of the good-will without paying for it; for he is at liberty [\*444] \*(unless restrained by agreement) to carry on business on his own account, (u) and possibly in the old place of business and in the name of the late firm. (x)<sup>3</sup> Under these circumstances, if, on the death of a partner,

plant the latter person in the good-will of his paper. *Bell v. Locke*, 3 Paige, Ch. 75.

And after dissolution a partner may be enjoined from appropriating the good-will to the exclusion of the other partners. And even after a receiver has been appointed for the firm, or after it has made an assignment in bankruptcy, one partner may restrain another one from a wrongful attempt to appropriate the good-will and name of the former firm. *Bininger v. Clark*, 10 Abb. Pr. N. S. 264.

A person, forming a copartnership with another, having agreed to leave at the end of the term, cannot, on retiring, claim an interest in the good-will of the business, and in accounting with his partner, who continues at the same place, have an allowance for such good-will. *Van Dyke v. Jackson*, 1 E. D. Smith, 419.

(r) *Smith v. Everett*, 27 Beav. 446; *Mellersh v. Keen*, id. 236, and 28 Beav. 453.

<sup>1</sup> See *post*.

(s) *Hammond v. Douglas*, 5 Ves. 539.

(t) *Wedderburn v. Wedderburn*, 22 Beav. 104; *Smith v. Everett*, 27 Beav. 446, and *Mellersh v. Keen*, id. 236, and 28 Beav. 453. See, also, *Gibblett v. Read*, 9 Mod. 459, a case of a newspaper.

<sup>2</sup> *Dougherty v. Van Nostrand*, 1 Hoff. Ch. 68; *Holden v. McMakin*, 1 Par. Sel. Cas. 270. See 3 Kent, Com. 64.

(u) *Farr v. Pearce*, 3 Madd. 74; *Davies v. Hodgson*, 25 Beav. 177.

(x) See, as to this, *infra*, note (e).

<sup>3</sup> A surviving partner is not entitled, without consent of the representatives of the deceased partner, to use the firm name in continuing the business. Either the partnership name perishes with the firm itself, and neither the representative nor the survivor is entitled to use it, or it is an interest held in common after the death of one partner, possessed legally by the survivor, but held for mut-

the good-will is put up for sale, it will produce nothing if it is known that the surviving partner will exercise his rights. He will therefore acquire all the benefit of the good-will; but he does not acquire it by survivorship, as something belonging to him exclusively, and with which the executors of the deceased partner have no concern; for if he did he might sell the good-will for his own benefit, and this he cannot do. (y) When, therefore, it is said that on the death of one partner the good-will of the firm survives to the other, what is meant is that the survivor is entitled to all the advantages incidental to his former connection with the firm, and that he is under no obligation,

ual benefit. *Fenn v. Bolles*, 7 Abb. Pr. 202. See, however, *contra*, *Staats v. Howlett*, 4 Den. 559.

A continuing partner may be enjoined from using the old firm name so as to give third persons good cause to believe that the retired partner was still in the firm—the latter, in selling out to the former, not having mentioned the good-will. *McGowan Bros. Pump & Machine Co. v. McGowan*, 22 Ohio St. 370.

A receipt given by executors for money due and paid to the estate of a deceased person from former partners, in which the latter are mentioned by the name of the former partnership, under which they continued to carry on business, will not be construed as a written consent to the continued use of the former partner's name in the new business and firm, if it was executed and delivered merely for the purpose of exhibiting the settlement of the claim. *Bowman v. Floyd*, 3 Allen, 76.

Where one of two partners in a ferry, who were tenants in com-

mon of the land adjacent, died, and his moiety was sold by his administrator, and the purchaser offered to form a partnership with the other partner, and was refused, and afterwards set up an opposition ferry, a court of equity refused to enjoin him. *Spanu v. Nance*, 32 Ala. 527.

In proceedings under the act of March 21, 1861, of Ohio, the good-will of the partnership, though not a distinct item of assets, should be considered as an element of value in the appraisal of the tangible property. And if it has not been considered in the appraisal, and the surviving partner has appropriated it to his own benefit, he may be compelled to account. *Rammelsberg v. Mitchell*, 29 Ohio St. 22.

(y) See *Smith v. Everett*, 27 Beav. 446; *Mellersh v. Keen*, id. 236, and 28 id. 453; *Wedderburn v. Wedderburn*, 22 Beav. 104. See, however, *Farr v. Pearce*, 3 Madd. 74, and *Hammond v. Douglas*, 5 Ves. 539, *contra*. The last case cannot be regarded as now law.

in order to render those advantages salable, to retire from business himself. (z)

**Good-will in case of retirement of one partner.**— Again, when a partner retires not only from the firm, but from the business carried on by it, the continuing partners will acquire the benefit arising out of the good-will for nothing, unless it has been agreed that they shall pay for it; for they retain possession of the old place of business, and they continue to carry on that business under the old name. This, in fact, secures the good-will to them, and they cannot be compelled to pay separately for it, unless some agreement to that effect has been entered into. (a)

**Good-will in connection with use of name.**— The right to continue the use of a partnership name is frequently the most important element in the good-will, and is governed by principles similar to those applicable to it. The [\*445] \*purchaser of the good-will of a business acquires the right not only to represent himself as the successor of those who formerly carried it on, (b) but also to use the old name (c) and to prevent other persons from doing the like. (d) If then the good-will of a partnership business has any salable value at all, it seems impossible to hold that on a dissolution of a partnership, whether by death or otherwise, any partner can continue the old business in the old name for his own benefit, unless there is some agreement to that effect, or at least to the effect that the assets are not to be sold. Such a right on his part is inconsistent with the right of the other partners to have the good-will sold for the common benefit of all. There are, however,

(z) See *Farr v. Pearce*, 3 Madd. 74; *Davies v. Hodgson*, 25 Beav. 177; *Mellersh v. Keen*, 27 Beav. 236, and 28 id. 453. *Steuart v. Gladstone*, 10 Ch. D. 626. Compare *Wade v. Jenkins*, 2 Giff. 509, *infra*, p. 448.

(a) See *infra*. An agreement to pay out a retiring partner the value of his share as shown by the last annual account does not entitle him to have the good-will valued, (b) *Churton v. Douglas*, Johns. 174, *ante*, p. 441.

(c) *Levy v. Walker*, 10 Ch. D. 436.

(d) See the last two notes.



authorities tending to show that, in the case of death, the surviving partners are entitled to continue to carry on business in the old name, (*e*) and to restrain the executors of the deceased partner from doing the like. (*f*) But if these cases are carefully examined they will be found scarcely to warrant so general a proposition. In *Webster v. Webster*, (*g*) the executors of a deceased partner sought to restrain the surviving partners from carrying on business in the name of the old firm; but the application was based upon the untenable ground that by so doing the surviving partners exposed the estate of the deceased partner to continued liability. No question of good-will appears to have been in dispute. In *Lewis v. Langdon*, (*h*) V.-C. Shadwell certainly intimated his opinion to be that surviving partners had a right to continue to carry on business in the old name; (*i*) but the real question there was whether the executors of a deceased partner were entitled to continue the use of that name; and it was held that they were not, which is quite consistent with the absence of the same right on the part of the surviving partner. There seems, moreover, to have been some agreement not set out in [\*446] the report (*k*) which influenced the judge's decision; and at the time it was pronounced the doctrine that good-will is, if salable, a partnership asset was not so well established as it is at present.

**Continued use of name only wrong on one of two grounds.**—In considering this question the right of a late partner not to be exposed to risk by having his name continued in a business must not be forgotten; (*l*) and where

(*e*) *Webster v. Webster*, 3 Swanst. 490; *Lewis v. Langdon*, 7 Sim. 421; Robertson *v.* Quiddington, 28 Beav. 536; Banks *v.* Gibson, 34 Beav. 566. (*i*) See, too, *per* Lord Romilly, in 28 Beav. 536.

(*f*) See the last line in 7 Sim. 425. (*g*) See *Routh v. Webster*, 10 Beav. 561; *Bullock v. Chapman*, 2 De G. & Sm. 211; *Troughton v. Hunter*, 18 Beav. 470. See, also, *Hodges v. London Trams Omnibus Co.* 12 Q. B. D. 105.

(*h*) 7 Sim. 421.

(*j*) 3 Swanst. 490.

(*k*) 7 Sim. 421.

his name is part of the name of the firm, *e. g.*, if his name is A. B., and the name of the firm is A. B. & Co., so long as he lives he would, it is apprehended, in the absence of an agreement to the contrary, be entitled to restrain his late copartners and their representatives from carrying on business under the old name, and so continually exposing him to risk. But a sale by him of his interest in the good-will includes the right to use the old name even if it is his own. (*m*) The right of a late partner to prevent the continued use of his own name on the ground of exposing him to risk is a purely personal right, and does not devolve either on his executors or on his trustee in bankruptcy, for they would not be exposed to risk. Their right, and indeed the right of any partner whose name does not appear in the name of the firm, to prevent the continuance of the use of the name of the firm can only be maintained upon the ground that such right is involved in the more general right of having the partnership assets, including the good-will, sold for the common benefit. And if upon a dissolution this right is waived, or if the terms of dissolution are such as to preclude its exercise, then each partner cannot only carry on business in competition with the others, but each can represent himself as late of, or as successor to, the old firm, and each may use the old name without qualification; (*n*) at all events if he does not hold out the other partners as still in partnership with himself. (*o*)

**Good-will in connection with trade-marks.**—The use of a partnership trade-mark is another very important element in the good-will of its business. A partnership trade-mark is an asset of the firm, salable on a dissolution like

(*m*) *Levy v. Walker*, 10 Ch. D. 436; *Banks v. Gibson*, 34 Beav. 566. Note in the first of these, Miss Charbonnel, having married and changed her name, was not in fact held out as a partner.

(*n*) See *Banks v. Gibson*, 34 Beav. 566, and the cases cited in the last

four notes. See, as to describing oneself as late with or from another, *Glenny v. Smith*, 2 Dr. & Sm. 476.

(*o*) Even this qualification is doubtful. See *Levy v. Walker*, 10 Ch. D. 436.

any other asset. (*p*) The partnership name may be a trade-mark. (*q*)

**Valuation of good-will.**— Good-will is generally valued at so many years' purchase on the amount of profits.

**Agreements as to paying for good-will on retirement, etc.**— In framing articles of partnership too great care cannot be taken to express as clearly as possible what is intended to be done with respect to good-will; and, in order to avoid all ambiguity, the word itself should be made use of. There are cases which show that an agreement to take a retiring partner's share in the property and effects of the partnership, (*r*) or in the partnership premises, (*s*) do not entitle him to anything in respect of good-will. But in another case a clause, authorizing a surviving partner to take the stock of the partnership at a valuation, was held to entitle the executors of a deceased partner to a share of the value of the good-will of the partnership and of a trade-mark belonging to it. (*t*)

When an agreement is entered into to the effect that a retiring partner shall be entitled to be paid for his interest in the good-will of the firm, it is material to determine whether the firm is to be regarded as of definite or of indefinite duration. For upon this will depend the amount to be paid to the retiring partner.

In *Austen v. Boys*, (*u*) a partnership was entered into for seven years with power for any partner to retire. In case of \*retirement the retiring partner was to [\*448] be paid by the continuing partners the fair market

(*p*) See *Bury v. Bedford*, 4 De G. J. & Sm. 353; *Hall v. Barrows*, 4 De G. J. & Sm. 150. Trade-marks registered under 46 and 47 Victoria, chapter 57, section 70, are only assignable with the good-will of the business. See *Wellcome's Trade-mark*, 32 Ch. D. 213.

(*q*) 46 and 47 Vict. ch. 57, § 64. See *ante*, book i, ch. 6, § 2.

(*r*) See *Hall v. Hall*, 20 Beav. 139; *Kennedy v. Lee*, 3 Mer. 452.

(*s*) *Burfield v. Rouch*, 31 Beav. 241. Compare *Blake v. Shaw*, Johns. 732.

(*t*) *Hall v. Barrows*, 4 De G. J. & Sm. 150.

(*u*) 24 Beav. 598; affirmed, 2 De G. & J. 626.

value of his interest and share in the partnership business and in the good-will thereof. Two days before the expiration of the seven years one of the partners retired, and the question arose whether, in ascertaining the value of his interest in the good-will of the business, the partnership business was to be considered as continuing or as ending at the expiration of the seven years. It was held that the good-will to be valued was the good-will of a business ending with the seven years, and that therefore the retiring partner's interest in it was nominal merely.

In *Wade v. Jenkins*, (x) partnership articles stipulated that the good-will should be deemed to be of the value of 6,000*l.* and should belong to the partners in the proportions in which they were entitled to the capital, but that the value of the good-will should not be taken into account in any of the accounts between the partners. On the death of one of the partners it was held that he was entitled to a share of the good-will, and that the last-mentioned stipulation only applied to the accounts taken during the continuance of the partnership.

In *Turner v. Major*, (y) partners agreed to dissolve and to have the assets and good-will sold by two persons selected by them; an injunction was granted to restrain one of the partners from violating this agreement by carrying on business on his own account before the good-will of the partnership had been disposed of.

**19. Getting in debts on dissolution.**—When a firm is dissolved it is usual to appoint one of the partners, or some third person, to collect and get in the debts of the firm.<sup>1</sup>

(x) 2 Giff. 509. Compare *Steuart v. Gladstone*, 10 Ch. D. 626, where there was no clause specially applicable to good-will.

(y) 3 Giff. 442.

<sup>1</sup> On a settlement of partnership affairs, if it is agreed that one of

the partners shall collect a note and accounts for the benefit of both, it will be presumed that the money, as fast as received, should be divided between the parties.

*Metcalf v. Fouts*, 27 Ill. 110.

Upon the dissolution of a part-

But, notwithstanding any such arrangement and notice thereof, a debtor to the firm will be discharged if he pays to any one of the partners. (2) Effect, however, will be given by the court to an agreement of the nature in question by appointing a receiver, and, if necessary, granting an injunction. (a) If the agreement is under seal and is broken, an action for damages may be \*brought [\*449] upon it. (b) But it has been held that an agreement not under seal, entered into between two members of a dissolved partnership, to the effect that one of them shall get in the debts of the firm, and pay what he shall receive in respect thereof to his copartner, is not an agreement on which the latter can maintain any action for damages in case the debts are got in, and the money received on account of them is not paid over; for it is said there is no consideration for such an agreement. (c) But it seems to have been admitted, in the case in which this was decided, that if the partner to whom the money when received is to be paid agrees that he will take no steps to collect the debts himself, that will be a sufficient consideration to support the promise to pay.

**Getting in debts when one firm succeeds another.—**

When a partner retires, on the terms that the continuing partners are to get in the old debts, and that such debts, when got in, are to be taken into account in ascertaining the share of the retiring partner, the latter will have a right to charge the continuing partners with whatever debts they

nership it was agreed that one of the partners should collect the bills of the firm, and that he should be allowed for his expenses in so doing. He employed an agent, who was at the time engaged in other business for him, to collect the bills. *Held*, that the partner was entitled to be allowed only for the amount paid the agent, and not for the value of the latter's services in the employment from which he

took him, which was much greater. *Porter v. Wheeler*, 37 Vt. 281.

(2) *Ante*, p. 134.

(a) *Davis v. Amer*, 3 Drew. 64.

(b) As in *Belcher v. Sikes*, 8 B. & C. 185.

(c) See *Lewis v. Edwards*, 7 M. & W. 300, where such an agreement was come to between a solvent partner and the assignees of a bankrupt partner.

may choose to take to themselves and not get in. As observed by Lord Romilly: "If continuing partners who are bound to get in debts belonging to an old firm think fit to enter into a new agreement with the debtors of the old firm by which those debtors become the debtors of the new firm, and the debts of the old firm become merged in that of the new firm by a security taken for the aggregate debt, such continuing partners are liable to the retiring partners for the amount of the old debt as one of the assets received by them." (*d*)

**20. Assignment of share, etc., by retiring partner.—**

When a partner retires or dies, and he or his executors are paid what is due in respect of his share, it is customary for him or them formally to assign and release his interest in the partnership, and for the continuing or surviving partners to take upon themselves the payment of the outstanding debts of the firm, and to indemnify their late partner or his estate from all such debts.

[\*450] **\*Assignment of debts.**—An assignment of all the partnership stock, debts, sums of money, and all other the personal estate and effects of the assignors as partners, did not before the Judicature Acts give the assignees a right to sue one of the assignors for a debt due from him to the partnership. (*e*) But if one of the assignors after the execution of the deed releases a debt which has been assigned, or negotiates a bill held by the firm, he becomes liable to an action, for he has no right to derogate from his own grant. (*f*)

**Stamp on assignment by outgoing partner.**—An assignment by a partner of his share and interest in the firm to his copartners, in consideration of the payment by them of what is due to him from the firm, is regarded as a *sale* of property within the meaning of the Stamp Acts; and consequently the deed of assignment requires an *ad valorem*

(*d*) *Lees v. Laforest*, 14 Beav. 262. (*f*) *Aulton v. Atkins*, 18 C. B.

(*e*) See *Aulton v. Atkins*, 18 C. B. 249.

stamp. (g) But if the retiring partners, instead of assigning his interest, takes the amount due to him from the firm, gives a receipt for the money, and acknowledges that he has no more claims on his copartners, they will practically obtain all they want; but such a transaction, even if carried out by deed, could hardly be held to amount to a sale, and no *ad valorem* stamp, it is apprehended, would be payable. (h)

**21. Usual indemnity.**—An indemnity is ordinarily given by a bond or covenant entered into by the continuing or surviving partners in consideration of the assignment to them of all the share and interest of the retiring or deceased partner.<sup>1</sup> The bond or covenant should be joint and

(g) *Christie v. Commissioners of Inland Revenue*, L. R. 2 Ex. 46; *Phillips v. Same*, id. 399; *Potter v. The Commissioners of Inland Revenue*, 10 Ex. 147. These cases overrule *Belcher v. Sikes*, 6 B. & C. 234.

(h) In *Steer v. Crowley*, 14 C. B. N. S. 337, a release by the executors of a deceased partner did not state the consideration, and bore only a common deed stamp; and it was held that the deed was a good document of title, although some penalty might be payable by the parties to it, or by their solicitors, for not stating the consideration.

<sup>1</sup>An indemnifying bond given by a firm to a retiring partner is intended to secure him against debts of the firm to third persons, on which he might be liable if the firm did not pay them. It would not be regarded as intended to cover a credit to the partner himself on the books of the firm. *Lambert v. Griffith*, 50 Mich. 286.

Where, on dissolution, all matters between the partners are settled, and one agrees to pay an out-

standing firm note, if the other is compelled by suit to pay it he may recover the amount from the former. *Warring v. Hill*, 89 Ind. 497.

An agreement by one to "release" his retiring partner from the firm debts amounts to a promise to pay them. *Griffith v. Buck*, 13 Md. 102.

An agreement for the dissolution of a partnership provided that the assets of the firm should remain in the hands of one of the partners, who agreed that he would therefrom pay the debts of the partnership as they matured, and should be charged interest on the stock and property purchased by him, and on all sums received by him, and credited with interest on all sums by him paid. *Held*, that he only agreed to apply the assets to the payment of the debts, and did not absolutely assume the payment of them. *Topliff v. Jackson*, 12 Gray, 565.

The firm of A., B. and C. dissolved partnership, and the members signed an agreement by which

several. (i) The effect of such a bond or covenant is to render a retiring partner, as between himself and his late

all the property of the firm was assigned to A. in trust to sell, and with the proceeds to pay the debts of the partnership. A. agreed to pay B. and C. \$100 each for their interest in the concern, to discharge all the firm debts, and to save B. and C. harmless therefrom. B. and C. indorsed on the instrument their receipt for the \$100. In an action by B. to recover from A. the amount of a debt of the firm that he had paid, the agreement was construed to make A. a purchaser, and not a mere gratuitous trustee; and the assignment of the partnership property was *held* to constitute a sufficient consideration to support A.'s promise to pay the debts of the firm, so that the plaintiff was entitled to recover the actual damage sustained from the breach of the contract. *Rose v. Roberts*, 9 Minn. 119.

There is nothing in the relation of partners which makes a mortgage given by one to the other on dissolution of partnership, to indemnify him against the partnership debts, fraudulent. *Whitmore v. Parks*, 3 Humpl. 95.

If a partner, after a dissolution of the partnership, assign all his interest in the partnership property for a valuable consideration, and take a covenant of indemnity against all liability for the debts of the partnership, the covenant does not cover a debt which does not appear upon the partnership books and was not made known to the assignee at the time of the contract

of indemnity. *Case v. Cushman*, 3 Watts & S. 544.

Upon the dissolution of a partnership between D. and H., H. purchased the interest of D. and gave to him a bond signed by himself and another, conditioned to indemnify and save D. harmless from all and singular the debts and liabilities of the firm. At the end of the formal part of the bond were added the words: "Liabilities as per schedule of indebtedness hereto annexed." In an action upon the bond, *held*, that the general terms of the condition were limited and qualified by the added clause, and that the obligors were not liable for a firm debt not scheduled. *Holmes v. Hubbard*, 60 N. Y. 183.

Where one of two partners sells out his interest to the other, who agrees to pay all the firm debts and indemnify the selling partner, which agreement is guarantied by a surety, such surety is not liable in an action brought against him by a creditor of the firm to recover one of the debts so guarantied, as, in such case, there is no privity of contract between the parties to the suit. *Campbell v. Lalock*, 40 Pa. St. 448.

See, also, *Mackintosh v. Tatman*, 38 How. Pr. 145.

Where, however, on the dissolution of a partnership, one partner takes the partnership effects and executes to the other a bond, with surety, conditioned for the payment of all the partnership debts,

(i) See, as to this, *ante*, p. 196.



copartners, a surety only for the payment of the partnership debts; (*k*)<sup>1</sup> \*and to render him their [\*451]

such bond is, in equity, held to be a trust fund in which all the creditors have an interest, and which they (the partners being insolvent) can subject to the payment. *Wilson v. Stillwell*, 14 Ohio St. 464.

See, also, *Deval v. McIntosh*, 23 Ind. 529.

In *Hood v. Spencer*, 4 McLean, 168, it was held that a bond to relieve a late copartner from the debts of the firm, and to pay the same, is not a contract of indemnity merely, but an action may be maintained upon it, either by the obligee or by the creditors of the firm, for non-payment of such debts.

If a partner has sold out to his copartner, and has taken a bond of indemnity as security that the latter will pay the debts of the firm according to agreement, he cannot, it is held, be substituted in the place of the creditors of the old firm to enforce their claims against such copartner, or enforce against his copartner executions obtained against himself by the creditor, or subject the partnership property sold to the latter to the payment of the debts. *Griffin v. Orman*, 9 Fla. 22.

On the other hand, in *Merrill v. Green*, 55 N. Y. 270, it was held that, where one partner, after being bought out by his copartners under covenant that they will pay the firm debts and indemnify him

against them, pays debts and becomes their surety, he is entitled to come in as a creditor and be subrogated to the rights of the creditors whom he has paid.

When, upon plaintiff's retiring from a firm, the other members thereof gave him a covenant of indemnity against any loss or damage on account of the firm debts, *held*, that no cause of action accrued thereon to plaintiff until he was subjected to damage on account of the partnership liabilities, and that the statute of limitations did not run until then. *Carter v. Adamson*, 21 Ark. 287.

Where one purchases the interest of one of the partners in a partnership and takes his place in the firm, not agreeing to pay at once all the debts of the firm, but only that he will "*assume*" the share of the liabilities of the firm which belong to the outgoing partner, the intent and meaning of such assumptions is to indemnify the outgoing partner. If the latter is obliged to pay any of the old debts under such circumstances, then, and then only, he is entitled to maintain his action. *Coleman v. Lansing*, 65 Barb. 55.

In *Peacey v. Peacey*, 27 Ala. 683, however, it was held that, on the dissolution of a partnership, if the remaining partner, who takes all the goods and partnership effects, covenants to become solely respon-

(*k*) *Rodgers v. Maw*, 4 Dowl. & L. 66; *Oakeley v. Pasheller*, 4 Cl. & Fin. 207, *ante*, p. 251.

<sup>1</sup>See *Mair v. Canavan*, 8 Daly,

272; *Thurber v. Corbin*, 51 Barb. 216; *Thurber v. Jenkins*, 36 How. Pr. 66.

specialty creditor if, notwithstanding their indemnity, he is compelled to pay those debts. (l)

sible for the outstanding partnership debts, the covenant is not one of indemnity merely, but binds him to discharge the retiring partner, within a reasonable time, from all liability for the debts; and if he dies without complying with his engagement, and his estate is declared insolvent, the retiring partner has a claim against the estate to the amount of the outstanding debts.

On the dissolution of the partnership of A. and B., in June, which was then insolvent, A. and C., with whom A. formed a new partnership, contracted with B. to pay all the debts due from the late firm of A. and B., amounting to \$1,735, and also to save B. harmless from any cost, trouble or liability on account of such debts. These debts were all then due to the respective creditors of A. and B., and A. and C. proceeded to pay them; but, on the 24th of October following, there remained of such debts \$635 unpaid. B., not having paid any part thereof nor been subjected to any trouble on account of them, brought his action against A. and C. for a breach of the contract. *Held*:

1. That though, where the contract was one of indemnity merely, no action thereon will lie for the liability or exposure to loss until actual damage, capable of appreciation, has been sustained by the plaintiff, yet, where the contract is to perform some act for the plaintiff's benefit as well as to indemnify and save him harmless

from the consequences of non-performance, the neglect to perform the act, being a breach of contract, will give an immediate right of action; consequently, in this case, the action brought by B. was sustainable.

2. That it was the duty of A. and C., under the contract, to pay the debts of A. & B., according to their tenor, which, as they were all then due, was immediately.

3. That if otherwise they should be paid in reasonable time, which had then elapsed.

4. That the rule of damages was the amount of debts unpaid at the commencement of the action, with interest. *Lathrop v. Atwood*, 21 Conn. 117.

So, in *Beny v. McLean*, 11 Md. 92, it was held that under a written contract by the continuing partners in a firm to pay the debts of the firm and acquit a retiring partner, but not stating when they are to be paid, those which will not be due until after the execution of the contract need not be paid until they fall due, and those which are then due are to be paid in a reasonable time. See, also, *Dorsey v. Dashiell*, 1 Md. 198; *Faust v. Burgevin*, 25 Ark. 170.

A. and B., being partners, dissolved their partnership, A. giving his note to B. for his interest in the partnership property and agreeing to pay all the partnership debts, except a note to one S., which B. assumed and agreed to pay. In a suit by B. against A. on the note of the latter, A. answered, by way

(l) *Musson v. May*, 3 V. & B. 194.

**Right to indemnity.**—It is to be observed that, in the absence of any agreement to that effect, a retiring partner

of set-off, the agreement of B. to pay the note held by S., averring that it was due and wholly unpaid, and that he, A., was personally liable for the amount thereof. *Held*, that the answer was a good defense to an amount equal to the note due to S. *Mullendore v. Scott*, 45 Ind. 113.

Where, upon the dissolution of a firm, one partner covenants with his copartner to hold him harmless from all liability or obligation to pay the debts of the firm, the recovery of judgment on these debts, or any of them, is a breach of the covenant whether the plaintiff has paid such judgments or not. *Sinsheimer v. Tobias*, 53 N. Y. Super. Ct. 508; *Pope v. Hays*, 19 Tex. 375.

So a judgment in a suit against B., one member of a dissolved firm, on a firm note, for want of an affidavit of merits, held to be *prima facie* evidence of his right to maintain an action against C., another member thereof, on C.'s covenant of indemnity to pay all the firm debts; notwithstanding a judgment had been recovered in another state on the same note against all the members except B., who had not then been served with process. In B.'s action against C. the validity of the judgment against B. could not be inquired into. *Bennett v. Cadwell*, 70 Pa. St. 253.

A covenant by the remaining partner to hold the retiring member harmless from all firm indebtedness is broken by a failure to pay a firm note for the payment of which the retiring member's in-

dividual property had been hypothecated as collateral security. *Fay v. Finley*, 14 Phila. 206; S. C. 38 Leg. Intel. 222.

The plaintiff, upon retiring from the firm of which he had been a member, conveyed to his copartners his interest in the partnership, the latter agreeing to pay all the debts and save him harmless therefrom. Judgment was subsequently recovered against the plaintiff and his former copartners upon a firm debt. The plaintiff paid a portion of the amount due to the judgment creditors, taking from them an agreement in consideration thereof not to molest him or take his property upon the judgment, but reserving all their rights against all the other judgment debtors. *Held*, that the plaintiff might recover the amount so paid in an action against his former partners. *Brewer v. Worthington*, 10 Allen, 329.

A. and B., who were partners under the firm of A. & Co., contracted with C. for the delivery of certain stock and materials to them. After the delivery of a portion B. sold his interest in the business and firm to D., who continued the same business, under the same firm, with A., B. taking from D. a written agreement "to discharge him from all liabilities on account of purchases of stock and materials as one of the original firm of A. & Co." The rest of the stock and materials was thereafter delivered by C., who did not know of the change in the firm, and A. afterwards gave to C. a note signed A. & Co. for a portion

or the executor of a deceased partner has no right to an indemnity from the other partners, except so far as he

of the price, dated back to the time when A. and B. were in partnership. *Held*, that B., upon paying the note and balance of the account, might maintain an action upon the agreement against D. to recover the same. *Nichols v. Prince*, 8 Allen, 404.

Where, on the dissolution of a firm, one of the partners covenants to pay all the company debts, in an action against him for a breach of that covenant by his partner, who has paid a debt of the firm, it is not necessary to aver notice to the defendant of the debt, nor of the suit, recovery and payment. *Clough v. Hoffman*, 5 Wend. 499.

Two partners sold their partnership effects to a third person, and the partnership was subsequently dissolved. One partner then assigned to the other all his interest in the partnership, the assignee taking all the partnership effects into his own hands. *Held*, that this operated as a discharge, by the act of the parties, of a covenant of the assignor, previously made with the assignee, to pay the debts of the partnership out of the partnership effects. *Austin v. Cummings*, 10 Vt. 26.

D. and H. entered into a copartnership in brick-making. D. gave his note for one-half the bricks on hand, and for one-half of the yard and the brick to be made for three years. At the end of eleven months the partnership was dissolved. D. had in the meantime paid \$200 on his \$500 note. The written terms of dissolution specified what each of the partners was to do, but said

nothing about the note. *Held*, that the presumption was that it was not extinguished, but was to be paid. *Durham v. Hartlett*, 32 Ga. 22.

A bond given to one of a firm upon the sale of his partnership interest, conditioned for the payment of the partnership liabilities, is satisfied by the payment of the debts to the amount of the penalty, though made through the assistance of a succeeding firm. *Perry v. Spencer*, 23 Mich. 89.

A guaranty that one partner in a distillery shall pay a government tax, and thereby protect the interest of his copartner in the firm, is not discharged by such partner's paying the tax out of the partnership property without the consent of the other, but if it is so paid with his consent this will be a compliance with the contract. *Smith v. Riddell*, 87 Ill. 165.

P. and K. dissolved partnership, K. taking the partnership property and giving P. a note for \$938, and agreeing to pay all partnership liabilities. K. subsequently failed, without having paid partnership debts to the amount of \$1,500, and informed P. that he could not pay them, and that P. must pay them. Finally, upon K.'s proposal, P. agreed to pay K. \$700, upon being indemnified, by certain persons named, against all said partnership debts, which indemnity was given, whereupon P. surrendered said note, and K. paid P. the balance, after deducting \$700, and P. discharged the mortgage given to secure the same. *Held*, that the in-

may be entitled to have the assets of the firm applied in payment of its debts, and to enforce contribution in case he has to pay more than his share of those debts. But if all the assets of the firm are assigned to the continuing or the surviving partners, it is only fair that they should undertake to pay its debts; and if it appears that it was the intention of all parties that they should do so, effect will be given to such intention, although the undertaking on their part is not explicit in its terms. (*m*)

**Effect of express indemnity on lien.**—When a retiring partner assigns his interest in the partnership assets, and obtains from the continuing partners a covenant of indemnity, his lien on the partnership assets seems to be at an end. In *Re Langmead's Trusts* (*n*) the assignment was made expressly subject to the payment of the retiring partner's share of the partnership debts. The continuing partner became bankrupt; and the retiring partner's executors were compelled to pay the unsatisfied partnership debts. It was nevertheless held that they had no lien on the specific assets of the old firm, but were confined to their remedy on the covenant for indemnity.

demnity was a sufficient consideration for the compromise, and that P. was entitled to recover said \$700 on said note, the transaction being free from fraud on the part of K. *Parmenter v. Kingsley*, 45 Vt. 362.

As to the liability of one partner upon a bond of indemnity executed by him to an outgoing partner against liability for firm debts, where the obligee in the bond has not notified the obligor so as to give him an opportunity to defend, see *Reed v. Orton*, 18 Weekly Not. Cas. 496.

A bond given by one partner to

another upon the dissolution of the firm, conditioned to pay the debts of the firm and hold the retiring member harmless, is a contingent liability barred by a late bankrupt act of the United States. *Fisher v. Tift*, 12 R. I. 56.

As to what constitutes a liability enforceable by suit on indemnity bond, see *Mette v. Feldman*, 45 Mich. 25.

(*m*) See *Saltoun v. Houstoun*, 1 Bing. 483.

(*n*) 7 De G. M. & G. 333. See, too, *Lingen v. Simpson*, 1 Sim. & Stu. 600. See, *ante*, pp. 354, 355.

**22. Arbitration clauses.**— With respect to these it is to be observed:

1. That an agreement to refer to arbitration is one which a court will not decree to be specifically performed; (*o*) and

2. That it is one which (independently of the Common-law Procedure Act of 1854) cannot be effectually set up as a defense to any action relative to a matter agreed [\*452] to be re\*ferred; (*p*) unless, indeed, the reference has been expressly made a condition precedent to the right to sue. (*q*) At the same time a court will sometimes decline to interfere between partners who have agreed that their disputes should be referred to arbitration, and who have not attempted so to settle them. (*r*)

By 17 and 18 Victoria, chapter 125, which contains several important provisions respecting agreements to refer to arbitration, it is amongst other things (by § 11) enacted that,—

“Whenever the parties to any deed or instrument in writing to be hereafter made or executed, or any of them, shall agree (*s*) that any then existing or future differences between them, or any of them, shall be referred to arbitration, and any one or more of the parties so agreeing, or any person or persons claiming through or under him or them, shall nevertheless commence any action at law or suit in equity against the other party or parties, or any of them, or against any person or persons claiming through or under him or them, in *respect of the matters*

(*o*) *Agar v. Macklew*, 2 Sim. & Stu. 418; *Street v. Rigby*, 6 Ves. 818. An action will lie for not referring in pursuance of an agreement so to do. *Livingston v. Ralli*, 5 E. & B. 132. See, generally, Fry, Spec. Perf. ch. 8 (ed. 2).

(*p*) *Dawson v. Fitzgerald*, 1 Ex. D. 257; *Edwards v. Aberayon*, etc. Soc. 1 Q. B. D. 563; *Cooke v. Cooke*, 4 Eq. 77; and the older cases referred to there.

(*q*) See *Scott v. Avery*, 5 H. L. C. 811; *Halfhide v. Fenning*, 2 Bro. C. C. 336. The last case is generally regarded as overruled; but *quære* whether it is not capable of being

supported on the principle recognized in *Scott v. Avery*. See the observations of Lord St. Leonards in *Dimsdale v. Robertson*, 2 Jo. & Lat. 91, and of V.-C. Wood in *Cooke v. Cooke*, 4 Eq. 77.

(*r*) *Waters v. Taylor*, 15 Ves. 10.

(*s*) In *Blyth v. Lafone*, 1 E. & E. 435, it was held that the agreement to refer must be contained in the instrument on which the dispute arises. But this has been overruled. See *Randell, Saunders & Co. v. Thompson*, 1 Q. B. D. 748, and *Mason v. Haddan*, 6 C. B. N. S. 525.

so agreed to be referred, or any of them, it shall be lawful for the court in which action or suit is brought, or a judge thereof, on application by the defendant or defendants, or any of them, after appearance and before plea or answer, upon being satisfied that no sufficient reason exists why such matters cannot be or ought not to be referred to arbitration according to such agreement as aforesaid, and that the defendant was at the time of the bringing of such action or suit, and still is, ready and willing to join and concur in all acts necessary and proper for causing such matters so to be decided by arbitration, to make a rule or order staying all proceedings in such action or suit, on such terms, as to costs and otherwise, as to such court or judge may seem fit; provided always that any such rule or order may at any time afterwards be discharged or varied as justice may require."

The section does not apply where a submission to refer has been revoked before action. (*t*)

\*The court will decide whether the matters in dispute are or are not within the arbitration clause. (*u*) But even if they are the section is not imperative; and the court in the exercise of its discretion has declined to interfere where there were several matters in dispute, some only of which were within the agreement to refer: (*v*) where one of the parties had become bankrupt; (*x*) where there was a *bona fide* suggestion of fraud; (*y*) where there was really no question in dispute, and the defendant's only object was delay; (*z*) where the object was to stop a suit, and not really to settle a dispute, which the defendant desired to refer before the suit was commenced. (*a*)

Where, however, there is a *bona fide* dispute within the meaning of an agreement to refer, and there is no satis-

(*t*) *Randell, Saunders & Co. v. Thompson*, 1 Q. B. D. 748. See, also, *Deutsche Springstoff Actien Gesellschaft v. Briscoe*, 20 Q. B. D. 177. 316. Compare *Russell v. Russell*, 14 Ch. D. 471, where the party complaining of fraud resisted arbitration.

(*u*) See *Piercy v. Young*, 14 Ch. D. 200.

(*v*) *Wheatley v. Westminster, etc. Coal Co.* 2 Dr. & Sm. 347.

(*x*) *Pennell v. Walker*, 18 C. B. 651.

(*y*) *Wallis v. Hirsch*, 1 C. B. N. S.

(*z*) *Lury v. Pearson*, 1 C. B. N. S. 639. The true grounds of this decision appear to have been those stated above, but the report is obscure.

(*a*) *Corcoran v. Witt*, 8 Ch. 476, *n.*, explained in 16 Eq. 571.

factory reason why such dispute should not be settled by arbitration, legal proceedings will be stayed, (*b*) even although the agreement to refer is contained in articles of partnership for a term of years which has expired. (*c*)

In one case the court refused to interfere where the plaintiff sought to have a partnership dissolved, and to have a receiver appointed, on the ground of the defendant's misconduct; (*d*) but this case has not been followed; (*e*) nor is there any reason why the court should not appoint a receiver, if necessary, pending the arbitration. (*f*)

[\*454] **\*Power of arbitrator.**— Under a general submission by partners of all matters in difference between them, an arbitrator may dissolve the partnership; (*g*) and may order one partner to pay or give security for the payment of a certain sum to the other; (*h*) and apportion the assets between them; (*i*) and order conveyances to be made; (*k*) and direct one partner to sue in the name of himself and others, and give them a bond of indemnity; (*l*) and restrain one partner from carrying on business within certain limits; (*m*) and direct mutual releases to be executed. (*n*) It

(*b*) As in *Russell v. Russell*, 14 Ch. D. 471, where notice to dissolve had been given; *Law v. Garrett*, 8 Ch. D. 26, where the agreement was to refer to a foreign tribunal; *Plews v. Baker*, 16 Eq. 564; *Willesford v. Watson*, 8 Ch. 473, and 14 Eq. 572; *Randegger v. Holmes*, L. R. 1 C. P. 679; *Seligmann v. Le Boutillier*, id. 681; *Russell v. Pellegrini*, 6 E. & B. 1020; *Hirsch v. Im Thurn*, 4 C. B. N. S. 569.

(*c*) *Gillett v. Thornton*, 19 Eq. 599.

(*d*) *Cook v. Catchpole*, 10 Jur. N. S. 1068.

(*e*) *Plews v. Baker*, 16 Eq. 564; *Gillett v. Thornton*, 19 Eq. 599.

(*f*) See as to this, *infra*, note (*o*).

(*g*) *Green v. Waring*, 1 W. Blacks. 475; *Hutchinson v. Whitfield*, Hayes, Ir. Ex. 78. *Simmonds v.*

*Swaine*, 1 Taunt. 549, shows that a dissolution need not be awarded.

(*h*) *Simmonds v. Swaine*, 1 Taunt. 549.

(*i*) *Lingood v. Eade*, 2 Atk. 505; *Wood v. Wilson*, 2 Cr. M. & R. 241; *Wilkinson v. Page*, 1 Ha. 276.

(*k*) *Wood v. Wilson*, 2 Cr. M. & R. 241.

(*l*) *Burton v. Wigley*, 1 Bing. N. C. 665. And see *Goddard v. Mansfield*, 19 L. J. Q. B. 305; *Philips v. Knightley*, 2 Str. 903.

(*m*) *Morley v. Newman*, 5 D. & R. 317. In *Burton v. Wigley*, 1 Bing. N. C. 665, the award permitted a partner to carry on business, although the articles provided for his not doing so.

(*n*) *Lingood v. Eade*, 2 Atk. 505, where the arbitrator directed such



seems, however, that the arbitrator cannot appoint a receiver to collect and get in the partnership assets and credits; (*o*) nor direct one of the partners to pay money to him (the arbitrator) in order that he may apply it in payment of certain specified debts. (*p*) It has also been held that an arbitrator cannot enter into the question whether any part of a premium paid on entering into the partnership shall be refunded, unless the submission pointedly raises that question for determination. (*q*)

**23. Penalties and liquidated damages.**—The last clause in a partnership deed is often one by which each partner binds himself to pay, either by way of penalty or by way of liquidated damages, a certain sum in case of the infringement by him of any agreement contained in the previous clauses. A stipulation that, on the breach of any agreement in the articles, a sum \*shall be paid by [\*455] way of penalty, is of little real use, and is sometimes worse than useless, for the sum mentioned will not be payable unless damage to its amount can be proved; (*r*) and on the other hand the penalty generally limits the compensation which can be obtained, even although damage to a greater extent has been sustained. (*s*) Moreover, if there are several covenants, and if for any breach, however trivial, of any of them involving the payment of a small sum of money, it is stipulated that a large sum shall be paid by way of liquidated damages, the stipulation is always construed as a stipulation for payment of the large sum by way of penalty. (*t*) An agreement to pay a definite sum as liquidated damages in certain specified events, *e. g.*, on

releases to be settled by a master in chancery.

(*o*) *Lingood v. Eade*, 2 Atk. 505; *Re Mackay*, 2 A. & E. 356. But a receiver was appointed in *Routh v. Peach*, 2 Anstr. 519, and 3 id. 637.

(*p*) *Re Mackay*, 2 A. & E. 356.

(*q*) See *Tattersall v. Groote*, 2 Bos. & P. 131.

(*r*) See the note to *Gainsford v. Griffith*, 1 Wms. Saund. 57.

(*s*) See *Clarke v. Ld. Abingdon*, 17 Ves. 106.

(*t*) See *Wallis v. Smith*, 21 Ch. D. 243, where all the older cases are reviewed. See, also, *Elphinstone v. Monkland Iron and Coal Co.* 11 App. Ca. 332.

carrying on business within prescribed limits, may no doubt prove useful; (*u*) but even in these cases care must be taken not to make the contract alternative; for if it is, and the stipulated sum is paid, a court will not interfere by injunction. (*x*) The mere existence of an agreement for liquidated damages does not, however, necessarily make a contract alternative, and preclude such interference. (*y*)

(*u*) *Atkyns v. Kinnier*, 4 Ex. 776; (*x*) *Sainter v. Ferguson*, 1 Mac. & Reynolds *v. Bridge*, 6 E. & B. 528, G. 286; *Woodward v. Gyles*, 2 may be referred to as examples. Vern. 119.  
See, too, *The East India Co. v. Blake, Finch*. 117, where it was held that though a court of equity would relieve against a penalty it would not relieve against payment of liquidated damages. (*y*) *French v. Macale*, 2 Dr. & War. 269; *Coles v. Sims*, 5 De G. M. & G. 1. And see *Avery v. Langford, Kay*, 663; *Clarkson v. Edge*, 33 Beav. 227.

## \*CHAPTER X.

[\*456]

### OF ACTIONS BETWEEN PARTNERS.

#### SECTION I.—GENERAL OBSERVATIONS.

##### 1. *Law before the Judicature Acts.*

The mutual rights and obligations of partners having been examined, it is proposed in the next place to consider the means by which those rights and obligations can be enforced.

**Legal proceedings between partners.**—It has been already seen (Bk. ii, ch. 3) that before the Judicature Acts there was no method by which an ordinary firm could sue or be sued by any of its members, either at law or in equity; for the firm, as distinguished from the persons composing it, had no judicial existence. All proceedings, therefore, which had for their object the enforcement of the mutual rights and obligations of partners, had to be taken by some or one of the members of a firm individually against some others or other of them also individually. The consequences of this rule were important, for it followed from it:

1. That no action at law could be brought by one partner against another for the recovery of money or property payable to the firm as distinguished from the partner suing;

2. That no suit in equity was maintainable by one partner against another with respect to a matter in which the firm was interested, without bringing all the members thereof before the court. This rule was subject to exceptions, as will be seen hereafter; but it was established as a rule, and flowed from the non-recognition of the firm.

Moreover, until the law was altered by 31 and 32 Victoria, chapter 116, no criminal prosecution was sustainable

[\*457] by one partner against \*another for stealing the property of the firm. (a) But this inconvenience has been removed by the above-mentioned statute. (b)

The inability of a *firm* to sue one of its members, and *vice versa*, arose from the circumstance that in an action by a firm against one of its members, or *vice versa*, the member in question must be both a plaintiff and a defendant. Practically it is often extremely inconvenient to have recourse to the intervention of a trustee, and to procure agreements to be made with him so as to enable him to sue and be sued thereon. But, inconvenient as this was, it was only through the intervention of a trustee that agreements between partners and the firms to which they belonged could be so entered into as to be enforceable by action at law. (c) An agreement by each partner with his copartners might indeed be framed so as to enable one to be sued by the others, if care was taken to exclude the partner sued from

(a) In *R. v. Warburton*, L. R. 1 Cr. Ca. Res. 274, it was held that a partner might be convicted of conspiring with others to defraud his copartner by falsifying the accounts of the firm, and thereby, in effect, robbing his copartner. But in *R. v. Evans*, 9 Jur. N. S. 184, a partner who misrepresented the partnership accounts, and thereby obtained more than his share of money, was held not liable to conviction for obtaining money under false pretenses. And in *R. v. Loose*, 29 L. J. M. C. 132; *R. v. Marsh*, 3 Fos. & Fin. 523; *R. v. Bren*, 3 N. R. 176, members of friendly societies indicted for stealing the moneys of the societies were held not liable to conviction. However, in *R. v. McDonald*, 7 Jur. N. S. 1127, a servant who was paid a salary and a percentage of profits was convicted of embezzlement; and in *R.*

*v. Burgess*, 2 N. R. 85, and in *R. v. Webster*, 7 Jur. N. S. 1208, a member of a friendly society was convicted of larceny, and in *R. v. Proud*, 10 W. R. 62, of embezzlement. In the last three cases, however, there were special circumstances as regards the possession of the money and the trust reposed in the prisoner. A shareholder in a banking company governed by 7 George 4, chapter 46, was convicted of embezzling money of the company in *R. v. Atkinson*, Car. & Marsh. 525.

(b) See on it, *R. v. Smith*, L. R. 1 Cr. Ca. R. 266; *R. v. Robson*, 16 Q. B. D. 137; *Roope v. D'Avigdor*, 10 id. 412.

(c) See *Bedford v. Brutton*, 1 Bing. N. C. 399, as to an action by a partner against the trustees of himself and copartners.

all share in what was sought to be recovered from him, and to exclude the partner suing from all obligation to contribute to his own payment; (*d*) but an agreement drawn

\*so as to accomplish both these objects was not generally convenient. [\*458]

**Stipulation that secretary, etc., for time being shall sue.**—It was not, however, competent for partners to establish, even as amongst themselves, a rule that some officer, *e. g.*, the treasurer or secretary of the firm for the time being, should, as it were, represent the firm and sue and be sued on its behalf accordingly. Consistently with the established law, effect could not be given to such a rule, and it was simply nugatory. (*e*) The consequences of this doctrine when applied to companies were extremely serious.

## 2. *Effect of Judicature Acts.*

**Effect of the Judicature Acts.**—The general effect of the Judicature Acts, so far as they relate to legal proceedings by partnerships, has been already investigated (Bk. ii, ch. 3); and it was then seen that a firm can now sue and be sued in its mercantile name; that where parties are numerous and have a common interest some of them may sue and be sued on behalf of all in respect thereof. Further, there is now the same facility in arranging parties to actions in all divisions of the high court as there was formerly in arranging parties to suits in equity; and the fact that an account has to be taken in order to ascertain what is due from one party to another is no longer any reason why an action by one against the other should fail; at most such a circumstance may render it expedient to transfer the action from one division of the high court to the other at some stage of the action. Nor is there any danger

(*d*) *Radenhurst v. Bates*, 3 Bing. 45; *Gray v. Pearson*, L. R. 5 C. P. 463. 568. As to bills of exchange, see

(*e*) *Hybart v. Parker*, 4 C. B. N. ante, p. 180, note (*a*).  
S. 209; *Evans v. Hooper*, 1 Q. B. D.

now of an action for an account being held unsustainable on the ground that an action for damages is the proper remedy. (*f*)

**Actions by and against the firm.**— With respect [\*459] to actions by the firm, it has been already \*pointed out that the name of the firm is only a compendious expression for denoting the individuals composing the firm when the name of the firm is used. It has not yet been decided whether an action in the name of the firm can be maintained by or against one of its own members; but the writer sees no difficulty in principle in supporting such an action; the firm being regarded for the purposes of the action as one collective whole. (*g*) This, however, is comparatively an unimportant matter; for if an action in that form cannot be maintained, it is plain that one partner can sue another whenever he has legal or equitable rights to be enforced or adjusted. (*h*)

**Actions by or against some on behalf of others.**— With respect to actions by or against some partners on behalf of themselves and others, it must be borne in mind that suits in this form have long been familiar in courts of equity, and certain rules respecting them have been settled which are not interfered with by the Judicature Acts. These rules will be fully investigated presently.

(*f*) See as to the jurisdiction of the court of chancery to entertain a suit for an account where there was no partnership, trust or fraud, *Smith v. Leveaux*, 2 De G. J. & Sm. 1; *Moxon v. Bright*, 4 Ch. 292; *Hemings v. Pugh*, 4 Giff. 456; *Barry v. Stevens*, 31 Beav. 258. See, also, as to claims for mere damages, *Great Western Ins. Co. v. Cunliffe*, 9 Ch. 525; *Duncan v. Luntley*, 2 Mc. & G. 30; *Clifford v. Brooke*, 13 Ves. 132.

(*g*) Such actions are common in Scotland.

(*h*) There may, however, still be difficulties in framing an action properly, as in *Robertson v. Southgate*, 6 Ha. 536. In that case there was a partnership of three persons, A., B. and C.; A. retired; B. filed a bill against A. and C. to set aside a fraudulent transaction in which the two defendants had concurred; then A. and B. became bankrupt. It was held that the joint assignees of A. and B. could not proceed with the suit against C.

## SECTION II.—PARTIES TO ACTIONS BETWEEN PARTNERS.

1. *General rule as to partnership actions.*

**General rules as to actions between partners.**—In actions between partners not involving any partnership account or any interference with persons against whom no relief is sought, the general principles applicable to actions generally must be observed. (i) But partnership disputes usually involve the taking of some account in which all the partners are interested, or the granting of an injunction, or the appointment of a receiver, which materially affects them all. Hence, it has long been a rule in chancery that where \*the number of partners is not [\*460] great they must all be parties to a suit for an account if within the jurisdiction of the court; (k)<sup>1</sup> and, sub-

(i) *Ante*, book ii, ch. 3.

(k) See *Hills v. Nash*, 1 Ph. 594.

<sup>1</sup> *Elliott v. Deason*, 64 Ga. 63; *Bell v. Donohoe*, 8 Sawyer, C. Ct. 435; S. C. 17 Fed. R. 710. Authorities upon this point might easily be multiplied.

When certain specific articles of partnership property are sold on execution against one partner, on bill by the purchaser to settle and adjust the partnership concerns and for a sale of the partnership property and a distribution of the proceeds, the debtor partner whose property was sold is an indispensable party in order to make the decree binding on all.

In such case the objection to his not being made a party is not too late when made on appeal or writ of error. *Gerard v. Bates*, Sup. Ct. Ill., March 28, 1888.

Where the partnership articles provided that the partnership should expire by limitation, but the

business was allowed to run on until a later date, when a new firm was formed, leaving out one of the original partners and bringing in another, *held*, that the partner who was dropped had a right to an account from the members of the new firm. *Near v. Lowe*, 49 Mich. 482.

Where one partner confederates with a third person to defraud the firm, such third person may properly be made defendant in a bill for an account. *Penniman v. Jones*, 58 N. H. 447.

In an action for an accounting between one partner and the purchaser of the interest of the other partner at an execution sale, the partner whose interest has been sold is a necessary party to the action. *Wright v. Ward*, 65 Cal. 525.

In a bill for an account and settlement by one partner against the other, the individual creditor of the plaintiff and assignee of his in-

ject to the question how far the firm can be treated as representing them all, this rule is still in force.

**Action against estate of deceased partner.**— Upon a similar principle, where a creditor of a firm sought payment of his debt out of the estate of a deceased partner, the surviving partners had to be made co-defendants with the executors of the deceased. (*l*)<sup>1</sup>

**Actions for dissolution.**— It follows from the same principle that to an action for a dissolution or winding up of an ordinary partnership all the partners within the jurisdic-

terest in the result of the partnership has the right to be joined with him as plaintiff. *Nichol v. Stewart*, 36 Ark. 612.

A member of one firm cannot embrace in the same bill an account between his partner and himself, and another between his firm and another firm. *Corner v. Gilman*, 53 Md. 364. See, also, *Dimond v. Henderson*, 47 Wis. 172.

On a bill for an accounting, including the interest of a deceased partner, the latter must be represented in court. *Jeness v. Smith*, 58 Mich. 281.

As to who are proper parties to a bill for an account against executor and surviving partner, see *Burn v. Burn*, 8 Ont. 237.

In an action for a dissolution of the partnership and for an account, *held*, that a nonsuit was properly granted as to a party who had purchased the mortgaged property at a foreclosure sale against one of the partners. *Clark v. Ritter*, 59 Cal. 669.

Strangers who sustain no relation of privity to a firm cannot complain on the ground that there has not been any settlement between one copartner and his firm.

*Pike v. Martindale*, 6 West. Rep. 838.

(*l*) *Re Hodgson*, 31 Ch. D. 192; *Wilkinson v. Henderson*, 1 M. & K. 582. This subject will be examined hereafter.

<sup>1</sup> A creditor of an insolvent partnership may properly bring a joint action against the firm's assignee for benefit of creditors, the representatives of a deceased partner, and the surviving partners, to compel the assignee to account and pay over to the plaintiff his share of the proceeds of the partnership property, and (it being alleged in the complaint that the surviving partners are insolvent) to recover of the representatives the balance of plaintiff's claim. *Haines v. Hollister*, 64 N. Y. 1.

In an action against a wife, who is a member of a firm, to subject her interest therein to the payment of a debt of her husband, the other members of the firm are necessary parties. *Westphal v. Henney*, 49 Iowa, 542.

Partnership creditors need not be made parties to an action of settlement between partners. *Gridley v. Conner*, 2 La. Ann. 87.



tion must be parties; (*m*)<sup>1</sup> and that the representatives of deceased partners must be parties also if they have any interest in the partnership accounts. (*n*)<sup>2</sup>

(*m*) *Evans v. Stokes*, 1 Keen, 24; *Richardson v. Hastings*, 7 Beav. 301; *Harvey v. Bignold*, 8 id. 343; *Deeks v. Stanhope*, 14 Sim. 57; *Wheeler v. Van Wort*, 9 id. 193; *Long v. Yonge*, 2 id. 369; *Moffat v. Farquharson*, 2 Bro. C. C. 338; *Ireton v. Lewis*, Finch. 96.

<sup>1</sup> *Fuller v. Benjamin*, 23 Me. 255; *Waggoner v. Gray*, 2 Hen. & M. 603; *Gray v. Larrimore*, 2 Abb. U. S. 542; *McKaig v. Hebb*, 42 Md. 227; *Francis v. Lavine*, 21 La. Ann. 265; *Kennedy v. Anderson*, 98 Ind. 151. See, also, *Wells v. Stranger*, 5 Ga. 22.

So on a bill by the assignee of a share, for the settlement of a firm account, all the partners must be made parties defendant. *Fourth Nat'l Bank v. Carrollton Railroad*, 11 Wall. 624.

The insolvent partner as well as his assignee should be made parties to an action for the dissolution of the firm and settlement of its accounts. *Ogden v. Arnot*, 29 Hun (N. Y.), 146.

Where A. and B., partners, sold a stock of goods to C. and D., partners, taking their notes for the amount, and D. afterwards withdrew from the latter firm, and A. became partner with C. by purchase, paying for the interest by a receipt against the notes originally

given by C. and D., *held*, that B. had no interest in this new partnership, and was not entitled to be made a party to a bill by A. for a settlement and account. *Howell v. Harvey*, 5 Ark. 270.

A party who has acquired an interest in a partnership prior to its dissolution and has been recognized as a partner is a proper party to a bill for an account, and there is no error in decreeing that the defendant partner pay him the sum due him, though such defendant had not consented to his becoming a partner. *Rosenstiel v. Gray*, 112 Ill. 282.

In an action for the settlement of a commercial partnership it is unnecessary to join as plaintiff the apparent transferee of a portion of the partnership interests, if it appears that such transferee was a person interposed, with no real rights in the premises. *Janney v. Brown*, 36 La. Ann. 118.

Where A., B. and C. are in partnership, and C. sells all his interest in the property and credits to D., who takes his place in the firm, and a bill for settlement and account is subsequently filed by B. against A. and D., C. need not be made a party. *Howell v. Harvey*, 5 Ark. 270.

A bill filed January, 1867, set out will, if necessary, be constituted the legal personal representative of the deceased.

<sup>2</sup> See *Burchard v. Boyee*, 21 Geo. 6.

The surviving partner is a necessary party to a bill in equity brought

(*n*) See *Cox v. Stephens*, 9 Jur. N. S. 1144, and 2 N. R. 506; *Baboo Janokey Doss v. Bindabun Doss*, 3 Moo. In. App. 175, and *Cawthorn v. Chalie*, 2 Sim. & Stu. 127, where it appears that a surviving partner

**Action for share of ascertained sum.**— But although, in an action for obtaining payment of a proportion of an un-

a copartnership between two in the business of lumbering, farming, trade and navigation, from 1815 to 1845, when, one of the copartners having died intestate, the plaintiffs being the sole heirs of the deceased member, were admitted into the firm by the surviving partners, whereupon the partnership business continued until 1862; that in 1844 another person was admitted into a particular branch of the partnership business, which continued until 1854, when he sold out, received from the copartnership his share of the profits, and accounted for his share of the property, and at the same time the plaintiffs purchased the other partner's interest in this branch of the business; that the general business of the copartnership continued until 1862, when the original surviving partner died testate, and the defendants were appointed executors of his will; that the plaintiffs claimed an account of all partnership transactions from 1845 to 1862, as well as those prior in 1845. On demurrer: *Held*, 1. That the bill was not multifarious.

2. That the new partner in the particular branch of the partnership business need not be made a party.

3. That the bill was brought by the proper plaintiffs, they suing as partners and not simply as heirs. *Warren v. Warren*, 56 Me. 360.

One of several partners filed a bill against the others to obtain a dissolution, and damages against A., one of the defendants, for false

representations, whereby a great loss had accrued to the partners. A decree was rendered against A., and the bill dismissed as to the others, on a suggestion that the matters of the suit had been adjusted by them. *Held*, that this was erroneous, as one could not be permitted to sue separately, leaving grounds for suits among the rest; nor could he have a decree for damages which belonged to all the partners except A., a suggestion of adjustment being no evidence that the complainant had succeeded to the rights of the others; and as neither A. nor any property of his was within the state, the mere joinder of some of the partners with him, as fictitious defendants, could not confer jurisdiction as to him. *Maude v. Rodes*, 4 Dana, 144.

No hearing can be had upon a bill in equity, founded upon articles of copartnership, and naming all the partners as defendants, if the return upon the subpoena does not show that all the defendants residing within the state have been duly summoned to answer the bill, although those defendants who have been summoned have appeared and demurred thereto. *Homer v. Abbe*, 16 Gray, 543. See, also, *Stout v. Fortner*, 7 Iowa, 183.

When a suit to dissolve a partnership involves the question whether certain property is the homestead of one partner or partnership property, because bought with firm funds, the wife of such

by the administrator of a deceased partner praying that a previous

decree, substantially releasing a partnership debt, may be set aside,

ascertained sum, all the persons interested in that sum must, as a general rule, be parties, yet, where the sum to be

partner is a necessary party. *Rhodes v. Williams*, 12 Nev. 20.

In an action of accounting between partners, firm creditors may intervene for the purpose of shar-

ing in a fund in the hands of one of the partners resulting from the fraudulent sale by him of the firm property. *Grossini v. Perazzo*, 66 Cal. 545.

and the unpaid balance of the debt decreed to him as administrator. *Wickliffe v. Eve*, 17 How. 468.

The surviving partner is a proper co-defendant to a bill in equity which seeks to enjoin the administrator of a deceased partner from suing the complainant at law upon notes given in unsettled dealings between complainant and the deceased partner, relating to partnership affairs, and to compel an accounting in respect to those dealings. *Scott v. Scott*, 33 Ga. 102.

A bill by a surviving partner for an account and to enforce his equities against land owned by the firm, by a sale thereof, and for payment of the balance due him by the administrator, properly joins both the heir and the administrator as defendants. *Dilworth v. Mayfield*, 36 Miss. 40. See, also, *Cannon v. Copeland*, 43 Ala. 201.

Where a part of real estate belonging to a partnership was sold by the guardian of the heir of the partner in possession, *held*, that the administrator of such heir, after his death, was a proper party to a suit in equity by the other partner to recover his share of the proceeds. *McGuire v. Ramsey*, 9 Ark. 518.

Where complainant in chancery, who sues an administrator of a deceased partner, praying an account of partnership concerns, alleges in his bill that he is the sole heir of

the deceased partner, the fact that he is not does not make the bill abate for want of necessary parties, since a decree in his favor as administrator would not interfere with the rights of others, who might claim a distribution after the complainant received the money decreed to him. *Moore v. Huntington*, 17 Wall. 417.

Where a partner in a right of pre-emption to a lot of land neglects or refuses to join his copartner in obtaining an allowance of their claim, his heirs cannot come into equity for a division of such lot after such copartner has secured it all to himself. *Farber v. Levi*, 1 Morr. (Iowa), 372.

In an action by a partner against his copartner to obtain a dissolution of the partnership on the ground of a fraudulent sale of the property of the partnership by the latter, it is proper to make the fraudulent vendee a party. *Webb v. Helion*, 3 Robt. 625.

Where suit is brought by one of two partners against the other to obtain an accounting and payment of a balance justly due from the defendant to the plaintiff, and to set aside as fraudulent a release from liability as such partner, executed by the plaintiff to the defendant, a third person who has fraudulently and without consideration obtained from the defend-

divided is ascertained, and the shares into which it is to be divided are also ascertained, an action for the payment of one of those shares may be maintained without making the persons interested in the other shares parties. (*o*)<sup>1</sup>

**Sub-partnership.**—So where the account which is sought is one in which the partnership is concerned, it is not necessary or proper to make all the partners parties. If, therefore, a partner has agreed to share his profits with a stranger, and the latter seeks an account of those profits, he should

bring his action against that one partner alone and [\*461] not make the others parties. (*p*) \*This rule, however, does not apply to an action for an account brought by the assignee of a partner's share; (*q*) and where an equitable mortgagee of a share in a mine brings an action for foreclosure all the partners ought to be parties. (*r*)

**Actions against executors for account of profits.**—Whether, in an action against the executor of a partner for

ant portions of the partnership property, may also be made a party in order to subject the property so held by him to the payment of any balance due from the defendant to the plaintiff. *Wade v. Rusher*, 4 Bosw. 537.

Upon a bill for an account alleging that complainant sold his interest in a firm to one of the members thereof for less than its value, through fraud of the vendee, and that the firm has been dissolved, the third partner cannot be made a party defendant, as no decree can be rendered against him. *Hirsch v. Adler*, 21 Ark. 338.

One partner who brings his bill for relief against a note fraudulently obtained should join as defendant his copartner who participated in the fraud on him. *Williams v. Nicholson*, 25 Ga. 560.

(*o*) See *Weymouth v. Boyer*, 1

*Ves. Jr.* 416; *Smith v. Snow*, 3 Madd. 10. Compare *Hill v. Nash*, 1 Ph. 594.

<sup>1</sup> A bill in equity by one partner against one of his three copartners to recover one-fourth of \$3,211, alleged to have been gotten by the latter three by mistake in the dissolution settlement, is demurrable for non-joinder of the two other partners. *Johnston v. Preer*, 51 Ga. 313.

(*p*) *Brown v. De Tastet*, Jac. 284; *Raymond's Case*, cited by Lord Eldon in *Ex parte Barrow*, 2 Rose, 255; *Bray v. Fromont*, 6 Madd. 5. And see *Killock v. Greg*, 4 Russ. 285.

(*q*) See *Bergmann v. Macmillan*, 17 Ch. D. 423; *Whetham v. Davey*, 30 id. 574.

(*r*) *Redmayne v. Forster*, 2 Eq. 467.

an account of profits made by wrongfully employing the assets of the deceased in the business of a firm of which the executor is a member, it is necessary to make the other members of the firm parties, is not always easy to decide. The rule appears to be that they are necessary parties if the account sought is an account of all the profits made by the use of the capital of the deceased; but not if the account is confined to so much of those profits as the executors have themselves received. (s)

**Effect of praying injunction.**—Although a person may have no interest in the account to be taken, and would therefore be an improper party to an action confined to such account, yet, if an injunction is sought to be obtained against him specially, he must be made a party. For this reason the bank of England and sheriffs are often made parties to actions in which they have no real interest. (t)

2. *Where some partners may sue or be sued on behalf of themselves and others.*

**Some on behalf of themselves and others.**—It has been held in many cases, that, to a bill praying for a dissolution of a partnership, all the partners, however numerous, are necessary parties,<sup>1</sup> and that consequently a bill filed by some on behalf of themselves and others, and praying for a dissolution, is bad on demurrer. (u) This rule is supposed

(s) See *Vyse v. Foster*, 8 Ch. 309, and L. R. 7 H. L. 318; *Simpson v. Chapman*, 4 De G. M. & G. 154. Compare *McDonald v. Richardson*, 1 Giff. 81.

(t) See, for example, *Vulliamy v. Noble*, 3 Mer. 593; *Bevan v. Lewis*, 1 Sim. 376.

<sup>1</sup> In an action for an injunction and a receiver to close the business of a special partnership formed under the statute, on the ground of insolvency, it is necessary to bring before the court, as parties, all who have an interest to have the mem-

bers of the firm retain control of the assets. Where one of the special partners is deceased his executors or administrators should be joined as defendants. Especially should they be brought in where the decedent had covenanted that the partnership should continue for a term of years. *Walkenshaw v. Perzel*, 4 Robt. (N. Y.) 426; 32 How. Pr. 233.

(u) *Evans v. Stokes*, 1 Keen, 24; *Richardson v. Hastings*, 7 Beav. 301; *Harvey v. Bignold*, 8 id. 343; *Deeks v. Stanhope*, 14 Sim. 57;

to admit of no exception, and it has, though with [\*462] expressions of \*regret, been held to apply to unincorporated companies as well as to ordinary partnerships. (x) The reason given for the rule is that the affairs of a partnership cannot be finally wound up and settled without deciding all questions arising between all the partners, which cannot be done in the absence of any one of them. (y)

**Presence of public officer not sufficient.**— Even if a partnership is empowered to sue and be sued by a public officer, his presence is not, in an action for a dissolution, equivalent to the presence of all the partners. (z)

**No instance of decree for dissolution where all the partners were not before the court.**— But, notwithstanding these numerous authorities, it may be permitted to doubt whether it can be considered as a rule admitting of no exception whatsoever, that to every action for a dissolution all the partners must individually be parties. All that can on principle be requisite is that every conflicting interest shall be substantially represented by some person before the court. If, which is possible, the interest of each partner conflicts with that of all the others, then all must undoubtedly be parties. But if the partners are numerous, and it can be shown that they are divisible into classes, and that all the individuals in each class have a common interest, then, although the interest in each class conflicts with that of every other class, there seems to be no reason why, if each class is represented by one or two of the individuals composing it, a decree for a dissolution should not be made. (a) There is

*Wheeler v. Van Wart*, 9 Sim. 193; *Long v. Yonge*, 2 Sim. 369; *Ireton v. Lewis, Finch*, 96; *Moffat v. Farquharson*, 2 Bro. C. C. 338.

(x) See cases in last note and *Van Sandau v. Moore*, 1 Russ. 441; and *Davis v. Fisk*, in *Farren on Life Assurances*, and cited by counsel in *Younge's Reports*, p. 425.

(y) See *Richardson v. Hastings*, 7 Beav. 307.

(z) See *Van Sandau v. Moore*, 1 Russ. 441; *Davis v. Fisk*, cited in *You. 425*; *Abraham v. Hannay*, 13 Sim. 581; *Seddon v. Connell*, 10 Sim. 58.

(a) See *Richardson v. Larpent*, 2 Y. & C. C. 514, and the observations of Lord Cottenham in *Wallworth v. Holt*, 4 M. & Cr. 635. As to *Cockburn v. Thompson*, 16 Ves. 321, see the obs. of V.-C. Shadwell,

not, however, so far as the writer is aware, any case in which a decree for a dissolution has actually been made in the absence of any of the partners.

**\*Action not in terms seeking a dissolution.**— In [\*463] an action not claiming a dissolution the question of parties turns entirely on the nature of the right sought to be enforced. If an account is required, and it is one in which the interest of *each* partner is distinct from and in conflict with that of *all* the others, then all the partners, however numerous, must be parties, and their representation by others, or by a public officer or secretary, will not be sufficient. (*b*) On the other hand, if there are no such conflicting interests as above supposed, it will be sufficient if each distinct interest is represented by a party to the record. (*c*)

It was held in *Wallworth v. Holt*, (*d*) that where partners are too numerous to be brought before the court, and they are divisible into classes, and all the individuals in one class have a common interest, a suit instituted by a few individuals of that class on behalf of themselves and all the other individuals of the same class against the other members of the company is sustainable. Since this decision there have been many suits by some shareholders on behalf of themselves and others, praying for very general accounts (but studiously avoiding a prayer for a dissolution), and such suits have been successful whenever the interest of the ab-

2 Sim. 380, and observe that the real object was to make the defendants account for the money they had received, and that the question as to want of parties was not raised with reference to that part of the prayer of the bill which sought a dissolution. See, also, Ord. xvi, r. 9, and Ord. lv, rr. 3 to 9.

(*b*) See *Van Sandau v. Moore*, 1 Russ. 441; *Seddon v. Connell*, 10 Sim. 58; *Abraham v. Hannay*, 13 id. 581; *McMahon v. Upton*, 2 id.

473; *Sibley v. Minton*, 27 L. J. Ch. 53.

(*c*) Comp. *Harrison v. Brown*, 5 De G. & Sm. 728.

(*d*) 4 M. & Cr. 619. *Cockburn v. Thompson*, 16 Ves. 321, is an earlier decision on this point. See, too, *Good v. Blewitt*, 13 Ves. 397. See as to some on behalf, etc., in cases of voluntary societies assuming to be corporations, *Lloyd v. Loaring*, 6 Ves. 773.

sent partners has been the same as that of the plaintiffs on the record. (*e*)

**Actions not seeking division of assets.**— When no dissolution is claimed, and no winding up of the partnership is sought, an action may be properly instituted by some of a number of numerous partners on behalf of themselves and all others whose interest is identical with their own; and this form of action is constantly adopted where [\*464] numerous \*partners seek to make their managers account for secret benefits and advantages obtained by them in breach of the good faith owing to those whose affairs they conduct, (*f*) or to rescind contracts into which the partnership has been induced to enter by false and fraudulent representations. (*g*) So in the case of mutual insurance societies and friendly societies one member may sue the trustees or committee and one of each class of members as representing all the other members, where the object of the action is to obtain payment of what is due to the plaintiff. (*h*)

### SECTION III.—CASES IN WHICH COURTS WILL NOT INTERFERE BETWEEN PARTNERS.

**General rules as to interference between partners.**— There are three general rules by which courts of equity were influenced when their interference was sought by one partner against another, and to which it will be convenient

(*e*) See *Apperly v. Page*, 1 Ph. 779. See, for other instances, *Cramer v. Bird*, 6 Eq. 143; *Wilson v. Stanhope*, 2 Coll. 629; *Harvey v. Collett*, 15 Sim. 332; *Cooper v. Webb*, id. 454; *Clements v. Bowes*, 17 Sim. 167, and 1 Drew. 684; *Richardson v. Hastings*, 7 Beav. 323; *Butt v. Monteaux*, 1 K. & J. 98; *Sheppard v. Oxenford*, id. 491; *Sibson v. Edgeworth*, 2 De G. & S. 73. Compare *Williams v. Salmond*, 2 K. & J. 463.

(*f*) *Chancey v. May*, Prec. in Ch. 592; *Hichens v. Congreve*, 4 Russ. 562; *Taylor v. Salmon*, 4 M. & Cr. 134; *Beck v. Kantorowicz*, 3 K. & J. 237.

(*g*) See *Small v. Attwood*, You. 407, and 6 Cl. & Fin. 232.

(*h*) See *Pare v. Clegg*, 29 Beav. 589; *Bromley v. Williams*, 32 id. 177; *Harvey v. Beckwith*, 2 Hem. & M. 429.



at once to refer; for the same rules are observed by all divisions of the high court in all actions which before the Judicature Acts would have been suits in equity; in other words, in all actions for specific performance, for an account, for a receiver, for an injunction, and in those actions for fraud in which equitable relief as distinguished from the simple recovery of damages is sought. The rules in question, however, have no application to cases in which, prior to the Judicature Acts, one partner could have sued another at law. The rules alluded to are: 1, not to interfere except with a view to dissolve the partnership; 2, not to interfere in matters of internal regulation; 3, not to interfere at the instance of persons who have been guilty of laches.

*1. Of the rule not to interfere except with a view to dissolution.*

**Necessity of praying for a dissolution.**—Formerly courts of equity were adverse to interfering at all \*between one partner and another, unless it was for [\*465] the purpose of dissolving the partnership; or, if it was dissolved already, of finally winding up its affairs. Hence it will be found on reference to the older reported decisions, that, if a dissolution was not sought, the court would not decree a partnership account, nor restrain a partner from infringing the partnership articles, nor protect the partnership assets from destruction or waste. This rule, at no time perhaps very inflexible, has gradually been relaxed; it having been discovered to be more conducive to justice to interfere to prevent some definite wrong, or to redress some particular grievance, than to decline to interfere at all unless complete justice can be done by winding up the partnership, and in that manner settling all disputes. At the same time so difficult is it to shake off old associations and to run counter to established rules, that traces of the aversion alluded to may yet be found in the decisions of the courts, and especially in those which relate to the specific per-

formance of agreements to form partnerships and in those which relate to the appointment of receivers and managers. Indeed, notwithstanding the extent to which the rule has been relaxed in actions for an account, or for an injunction, one of the first points for consideration, even now, when one partner sues another for equitable relief, is, can relief be had without dissolving the partnership? Undoubtedly it may much more certainly than formerly, but not always when perhaps it ought. (*i*)

**Modern rule.**—Without stopping to inquire how the question is to be answered in any particular case (for that will be discussed hereafter) it may be stated as a general proposition that courts will not, if they can avoid it, allow a partner to derive advantage from his own misconduct by compelling his copartner to submit either to continued wrong or a dissolution; (*j*) and that rather than permit an improper advantage to be taken of a rule designed to operate for the benefit of all parties, courts will interfere in modern times where formerly they would have declined to do so. At the same time courts will not take the management of a going concern into their own hands, and, if they cannot usefully interfere in any other manner, [\*466] they will \*not interfere at all unless for the purpose of winding up the partnership.

2. *Of the rule not to interfere in matters of internal regulation.*

**Disinclination to interfere in matters of internal regulation.**—A court of justice will not interfere between partners merely because they do not agree. It is no part of the duty of the court to settle all partnership squabbles; it expects from every partner a certain amount of forbearance and good feeling towards his copartner, and it does not regard mere passing improprieties, arising from infirmities of temper, as sufficient to warrant a decree for dissolu-

(*i*) See *infra*, § 6.

(*j*) See *Fairthorne v. Weston*, 3 Ha. 392.

tion, or an order for an injunction, or a receiver. (*k*) And when partners have themselves agreed that the management of their affairs shall be intrusted to one or more of them exclusively, the court will not remove the managers or interfere with them, unless they are clearly acting illegally or in breach of the trust reposed in them. (*l*)

**Clubs.**—The rule not to interfere in matters of merely internal regulation or discipline is strongly exemplified in cases of clubs. (*m*)

It is, however, in dealing with disputes between the members of companies that the rule in question is practically of greatest importance. The application of it to them is, however, beyond the scope of the present volume. (*n*)

3. *Of the rule not to interfere at the instance of persons who have been guilty of laches.*

**Laches a bar to relief in equity.**—Independently of the statutes of limitation a plaintiff may be precluded by his laches from obtaining equitable relief. Laches presupposes not only lapse of time, but also \*the existence of circumstances which render negligence imputable; and unless reasonable vigilance is shown in the prosecution of a claim to equitable relief, the court, acting on the maxim *vigilantibus non dormientibus subveniunt leges*, will decline to interfere. (*o*)<sup>1</sup>

(*k*) See *Marshall v. Colman*, 2 J. & W. 266; *Smith v. Jeyes*, 4 Beav. 503; *Lawson v. Morgan*, 1 Price, 303; *Cofton v. Horner*, 5 Price, 537; *Warder v. Stilwell*, 3 Jur. N. S. 9; *Anderson v. Anderson*, 25 Beav. 190.

(*l*) See *Lawson v. Morgan*, 1 Price, 307; *Waters v. Taylor*, 15 Ves. 10.  
(*o*) Laches may preclude relief, although actual assent or intelligent acquiescence on the part of the plaintiff may not be proved, see *Evans v. Smallcombe*, L. R. 3 H. L. 256. See, as to acquiescence, *De Bussche v. Alt*, 8 Ch. D. 314.

<sup>1</sup> See *Groenendyke v. Coffeen*, 109 Ill. 325; *Stout v. Seabrook*, 30 N. J. Eq. 187, and *Hall v. Claggett*, 48 Md. 224 (laches a bar to a bill for an account).

(*n*) See *Foss v. Harbottle*, 2 Ha. Delay in demanding a partner-

**To a suit for an account.**—In the early case of *Sherman v. Sherman*, (*p*) two persons had dealings as merchants; one of them died; his widow filed a bill for an account, but, although the statute of limitations did not apply, the bill was dismissed on the ground that many years had elapsed since the dealings in question had taken place, and the deceased had allowed any claims he might have had to slumber. (*q*)

**Acquiescence in account.**—Again, where an account has been rendered, and has been long acquiesced in, unless fraud be proved, a court will not re-open it, although the account may be shown to be erroneous, and although no final settlement was ever come to. (*r*)<sup>1</sup> The same principle is acted on in taking accounts; for charges long improperly made and acquiesced in, or long omitted to be made, and known

ship accounting to constitute laches must have occurred subsequent to the dissolution of the copartnership, and for so long a period as to make the claim stale. *Harris v. Hillegass*, 5 Pacific Coast L. J. 240. See Statute of Limitations.

Where a partnership has never been dissolved the objection that the claim is a stale claim will not lie to a bill for an account. *Harris v. Hillegass*, 54 Cal. 463.

A decree requiring a copartner to account should be denied in every case where it appears the party seeking the account has by his laches rendered it impossible for the court to do full justice to both parties. *Stout v. Seabrook*, *supra*.

In *Foster v. Rison*, 17 Gratt. 321, it was held that if the cause of action in a suit by one partner against his copartner, for the settlement of the partnership accounts, be one to which the statute of limitations applies, but the lapse of time since

such action accrued be not such as to bring the case within the statute, laches and lapse of time cannot, in themselves, constitute a bar to the suit.

(*p*) 2 Vern. 276.

(*q*) See, too, *Sturt v. Mellish*, 2 Atk. 610.

(*r*) *Scott v. Milne*, 5 Beav. 215, and on appeal, 7 Jur. 709. See, too, *Williams v. Page*, 24 Beav. 654; *Stupart v. Arrowsmith*, 3 Sm. & G. 176.

<sup>1</sup> See *Heartt v. Corning*, 3 Paige, 566.

A formal settlement will not, four years after it has been made between partners who, having equally attended to, will be presumed equally cognizant of, its affairs, be disturbed, on the evidence of several debtors who testify, in general terms, to errors in the charges against them on the partnership books. *Coleman v. Marble*, 9 La. Ann. 476.

so to be, are regarded, in the absence of fraud, as having been made or omitted by agreement, and the question of mistake will not be gone into. (s)

**Laches in enforcing agreements for partnerships.**—The doctrine of laches is of great importance where persons have agreed to become partners, and one of them has unfairly left the other to do all the work, and then, there being a profit, comes forward and claims a share of it. In such cases as these the plaintiff's conduct lays him open to the remark that nothing would have been heard of him had the joint adventure ended in loss instead of gain; and a court will not aid those who can be shown to have remained quiet, in the hope of being able to evade responsibility in case of loss, but of being able to claim a share of gain in case of ultimate success.

\*Thus, in *Cowell v. Watts*, (t) the plaintiff and the [\*468] defendant had agreed to take land for the purpose of improving it, and letting it upon building leases. A long lease was accordingly obtained, and was taken in the name of the defendant. The plaintiff then applied to the defendant to enter into a written agreement upon the subject of their joint adventure, but this the defendant declined. The defendant also assumed to act as sole owner of the land obtained; he removed the plaintiff's cattle from it, and borrowed money on a mortgage of the land, and expended such money in building upon it. The plaintiff all this time did nothing, although he was aware of what was going on. After a lapse of eighteen months the plaintiff, by his solicitor, called upon the defendant to perform the original agreement; and the defendant declining, a suit for specific performance was instituted. The bill, however, was dismissed with costs, on the ground that the plaintiff had by his conduct induced the defendant to suppose that the plaintiff had abandoned the speculation, and that the defendant had the sole right to the land.

(s) *Thornton v. Procter*, 1 Anst. (t) 2 H. & Tw. 224.  
94, and see *ante*, p. 383.

**Laches where partnership is a mining partnership.—**

The doctrine now under discussion is especially applicable to mining and other partnerships of a highly speculative character. Mining operations are so extremely doubtful as to their ultimate success that it is of the highest importance that those engaged in them should know on whom they can confidently rely for aid; if, therefore, a person engages in a mining adventure in partnership with others, and disputes arise between them, and he is denied a partner's rights, he should be careful to assert his claims whilst the dispute is fresh; for if he lies by until the mine has been rendered prosperous by his copartners, and he then comes forward insisting on his rights as a partner, and seeks equitable as distinguished from legal relief, he will be refused it, on the ground that he has applied for it too late. (*u*) On this principle, in *Senhouse v. Christian*, (*x*) where several persons were lessees of a colliery, and, the lease being about [\*469] to expire, one \*of them obtained a renewal of it in

his own name, Lord Rosslyn dismissed with costs a bill filed by the others claiming the benefit of the renewed lease. The plaintiffs had allowed the defendant to work the colliery single-handed at a great expense; and although they were aware of all the facts when the original lease expired, they did not take any proceedings to enforce their rights until four years afterwards. This case was referred to with approbation by Lord Eldon in the case of *Norway v. Rowe*, (*y*) in which he refused a motion for a receiver made on behalf of a person claiming to be a partner, but whose rights had been long denied.

Again, in *Prendergast v. Turton*, (*z*) where the capital subscribed for working a mine was spent, and the plaintiffs

(*u*) See, in addition to the cases cited below, *Alloway v. Braine*, 26 Beav. 575, and *Walker v. Jeffreys*, 1 Ha. 341. more grounds than one for this decision, but the case is always regarded as an authority in support of the doctrine acted on by Lord

(*x*) Cited 19 Ves. 157, and reported in a note to 19 Beav. 356. Rosslyn in *Senhouse v. Christian*. (*z*) 1 Y. & C. C. C. 98, and on ap-

(*y*) 19 Ves. 144. There were peal, 13 L. J. Ch. 238.

refused to contribute more, but the other partners did contribute more, and ultimately, after a lapse of some years, succeeded in making the mine profitable, and then the plaintiffs came forward claiming their shares in the concern, their bill was dismissed by Vice-Chancellor Knight Bruce, and his decision was affirmed on appeal. The same doctrine was applied in *Clegg v. Edmonson*, (a) the facts of which are similar to those of *Senhouse v. Christian*, already referred to. In two respects *Clegg v. Edmonson* goes further than the other cases; for, first, the defendants had brought in no fresh capital, the mine having paid its own expenses; and secondly, although the plaintiffs had not asserted their claims by legal proceedings, they had constantly insisted on their right to participate in the profits obtained by the defendants under the renewed lease. Upon this point, however, it was observed by Lord Justice Turner, that he could not agree to a doctrine so dangerous as that a mere assertion of a claim, unaccompanied by any act to give effect to it, can avail to keep alive a right which would otherwise be precluded. (b)

\*In *Rule v. Jewell*, (c) a member of a cost-book [\*470] mining company, which was seriously in debt, had his shares forfeited for non-payment of calls. After five years he disputed the validity of the forfeiture and claimed to be reinstated as a partner. But it was held that he was precluded by his own laches from obtaining relief.

**Effect of evidence of abandonment.**— In the cases already referred to it will be observed that there was no posi-

(a) 8 De G. M. & M. 787. The suit, in so far as it sought for an account up to the time of dissolution, was sustained.

(b) This general proposition must of course be taken with reference to the case before the court. It cannot be laid down as universally true that protests are useless. They exclude inferences which, in their absence, might fairly be

drawn from the conduct of the party protesting, and are conclusive to show that no abandonment of right was intended. See in *Hart v. Clarke*, *infra*, p. 472.

(c) 18 Ch. D. 660. The statute of limitations was pleaded, but was held not to be a defense, though the action was not commenced until after six years from the alleged forfeiture. *Sed qu.*

tive evidence that the plaintiff had ever abandoned his rights; (*d*) and in *Clegg v. Edmonson* there was evidence to show that no abandonment had ever been contemplated. It need, however, scarcely be observed that positive evidence of abandonment, in addition to the negative evidence derived from mere lapse of time during which nothing has been done by the plaintiff, greatly improves the position of his opponent.

There are several cases illustrating this. In *Jekyl v. Gilbert*, (*e*) two artificers agreed to do work for their joint benefit; after the work was done the person for whom it was done refused to pay; the defendant requested the plaintiff to join in legal proceedings to compel payment, but the plaintiff declined. Thereupon the defendant brought an action for payment of the work done by him and obtained a verdict. The plaintiff then claimed half the amount recovered, but the court held that he was not entitled to any share of it.

So if a part owner of a ship disapproves of a proposed voyage and arrests the ship until the other part owners give him security for his share, he is not entitled to any portion of the profits arising from such voyage. (*f*)

[\*471] \*Again, where two persons agreed to take land on lease for a building speculation, and one of them afterwards opposed the prosecution of the speculation and died without ever having done anything to further it, it was held that the equitable estate and the legal estate were in the same person, viz., the survivor, and that he was not a trustee as to any portion of the land for the executors of the deceased. (*g*)

*A fortiori*, if a partner formally withdraws from an ad-

(*d*) In *Prendergast v. Turton* etc. Co. v. *McLister*, 1 App. Ca. p. 57.

perhaps there was, and it is on the ground that there was that Lord Chelmsford distinguished that case from *Hart v. Clarke*, which will be noticed hereafter. See 6 H. L. C. 539.

(*e*) *McNaghten's Select Cases in Chancery*, 29.

(*f*) *Davis v. Johnston*, 4 Sim. 539.

(*g*) *Reilly v. Walsh*, 11 Ir. Eq. 22.



venture when its prospects are bad will he be unable to claim a share of the profits resulting from it if it ultimately proves to be profitable; (*h*) such cases, however, are not so much cases of laches as of estoppel or agreements to release.

**Cases in which laches has not been a bar to relief.**—It is now necessary to advert to one or two cases apparently at variance with the foregoing, and in which persons claiming the rights of partners have succeeded in obtaining the assistance of a court of equity, although their demands have been stale, and although the success of the joint adventure has been due to the exertions of those against whom those demands were made.

The case of *Lake v. Craddock* (*i*) is sometimes referred to as one of the class now in question. But this case, in truth, only decided that if one of several partners chooses to claim the benefit of partnership dealings, after having for some time ceased to take any part in the affairs of the partnership, he must contribute his share of the outlays made by the other partners with interest. It was not decided in *Lake v. Craddock* that a partner could, on the above terms, claim the benefit of what had been done by the others; and although the decree gave a partner who had long abandoned the concern the option of either claiming a share on proper terms, or of being excluded altogether, the other partners do not appear to have raised any objection to this option being given.

The cases which are most at variance with those referred to \*in the preceding pages are the recent [\*472] cases of *Hart v. Clarke* and *Clements v. Hall*.

In *Hart v. Clarke*, (*k*) the facts were shortly as follows:

. . A mining company was formed on the cost-book principle,

(*h*) *Maclure v. Ripley*, 2 Mac. & G. 275.

(*i*) 3 P. W. 158. The bill in effect was filed by the plaintiff against four persons, his copartners, for an account. One of the defendants had long ceased to take any part

in the partnership affairs. An account was decreed, and liberty was given to this defendant to come in on terms, or to be excluded. He appealed, being discontented with the terms imposed.

(*k*) *Clarke v. Hart*, 6 H. L. C. 633;

and there was no express agreement authorizing the forfeiture of shares on the non-payment of calls. The plaintiff and the defendants were lessees of the mine, and the only shareholders therein. Money being required for carrying on the mine, and the plaintiff not furnishing his proportion of the sum required, was, on more than one occasion, informed that on continued non-payment his shares would be forfeited, and ultimately they were declared forfeited. The plaintiff, who had all along denied the power of his co-adventurers to forfeit his shares, and had suggested modes of obtaining money which they had not approved, gave them notice that, in the event of the mine proving successful, he should expect his share of the profits, and should, if necessary, take legal proceedings to enforce his claim. A year and a half then elapsed, and at the end of that time he asserted his claim; and, the defendants refusing to recognize it, a bill was filed for an account. The master of the rolls held it to be clear that no number of partners could exclude another partner and forfeit his share, but that the plaintiff was not entitled to be considered as still a partner; (1) because the notice to forfeit his share might be regarded as a notice to dissolve the partnership; and (2) because for nearly two years he had taken no step whatever to assert his rights, but had allowed other people to work the mine, and had only come forward when he found it had proved a profitable speculation. On appeal it was also held that the supposed right to forfeit had no existence; but it was further held (1) that the notice of forfeiture could not operate as a dissolution, inasmuch as that was not the object with which the notice had been given; and (2) that, under [\*473] the peculiar circumstances \*of the case, the plaintiff could not be held to have shown any intention to abandon the undertaking, and that the nature of mining

affirming *Hart v. Clarke*, 6 De G. Rule *v. Jewell*, 18 Ch. D. 660. M. & G. 232, and reversing S. C. 19 Shares in cost-book companies may Beav. 349. See, also, *Garden Gully*, now be forfeited. See 32 and 33 etc. Co. *v. McLister*, 1 App. Ca. 39, Vict. ch. 19, § 16, etc. also a case of forfeiture. Compare

speculations was such as to render it inequitable to lay down as a general rule that no adventurer should be entitled to relief in equity when the adventure becomes productive, unless he had paid up his calls whilst it remained unproductive.

**Ground of the decision in the last case.**—The ground of the decision in the above case, and that which distinguishes it from *Senhouse v. Christian* and other cases alluded to above, is this, viz., that the plaintiff in *Hart v. Clarke* had, as one of the lessees of the mine, a legal interest therein which nothing had displaced. The court, therefore, was in this position: It was compelled, either to make a decree in favor of the plaintiff, or to declare him a trustee of his share in the mine for the defendants; and, there not being sufficient grounds for justifying the latter alternative, the former was necessarily adopted. (l) Upon no other ground can the case, it is submitted, be distinguished from *Clegg v. Edmonson* and the other cases alluded to above; for, although reliance was placed, in the judgment in *Hart v. Clarke*, on the distinct notice given by the plaintiff that he did not acquiesce in the defendant's conduct, and should insist on his rights, it was decided in *Clegg v. Edmonson* that a protest did not enlarge the time within which redress must be sought in a court of equity. (m)

*Clements v. Hall* (n) is another case in which, notwithstanding the lapse of a considerable time, it was held that relief ought to be given to a person claiming an interest in a mine; but the facts in that case were very peculiar, and four judges were equally divided, Lord Cranworth and Lord Justice Turner holding that the plaintiff was entitled to relief, whilst Lord Justice Knight Bruce and Lord Romilly were of a contrary opinion. The facts were, in substance, as follows: A. and B. were lessees of a mine which they worked as partners. The lease expired, but

(l) See acc. *Rule v. Jewell*, 18 Ch. (n) 2 De G. & J. 173, and 24 D. 660. Beav. 333.

(m) *Ante*, p. 469.

[\*474] the lessees continued in possession as tenants from year to year, and worked the mine as before. In 1847 A. died, leaving C. his executor, and bequeathing an interest in the mine to D. B., after the death of A., worked the mine alone, claiming it as his own entirely, and refusing to give any account to C., who, however, constantly pressed for one. In 1850 B. negotiated for, and obtained from the landlord, a new lease, but on more onerous terms than before. Of this C. had no notice. After the new lease B., who, since the death of A., had only kept the mine going, began to work it in earnest and at a profit, and in 1851 D. filed a bill against B. and C. to establish his interest in the mine. C. admitted D.'s title, but B. put in no answer, and the suit was not prosecuted. In 1853 B. died and C. became his representative. In 1854 the plaintiff, who was the assignee of D.'s interest, filed a bill in the nature of a supplemental bill to D.'s former bill, and sought to have D.'s interest in the mine secured for his (the plaintiff's) benefit. C., who, as the representative of A., had admitted D.'s right in his suit, now, as representative of B., opposed the plaintiff's claim and insisted on lapse of time as a defense to the suit. But it was held (1) that on A.'s death his interest in the mine did not determine; (2) that his estate was entitled to share the benefit of the renewed lease; (3) that A.'s representative was not precluded, in 1853, from asserting this right against B., inasmuch as B. had kept A.'s representative in ignorance of the real state of the concern, and (4) that there had been no laches on the part of the plaintiff, or of D., through whom he claimed, inasmuch as, since 1851, there had been a bill on the file to secure their interest.

**Effect of recognition of title.**—Lastly, on the subject of laches it may be observed that, as positive evidence of abandonment materially strengthens the case of those resisting a stale demand, so, on the other hand, positive evidence of recognition affords an answer to a defense grounded on laches and lapse of time. Thus, where a

shareholder in a company became bankrupt, but his shares were carried in the books of the company to a separate account, and he was regularly credited with the dividends which became payable in respect of those shares, his assignees were held entitled to the shares and accumulated dividends, although \*twenty years had [\*475] elapsed since any claim had been made to them. (o)

**Result of the cases.**—Notwithstanding *Hart v. Clarke*, and *Clements v. Hall*, it is submitted that the doctrine laid down and acted upon in *Norway v. Rowe*, *Senhouse v. Christian*, *Prendergast v. Turton*, *Clegg v. Edmonson* and *Rule v. Jewell* may still be safely relied on in all cases except those in which the court can be driven, as it was in *Hart v. Clarke*, to the alternative of holding either that the plaintiff is entitled to relief, or that he has abandoned and lost his former *legal* status. (p)

**Demurrer on the ground of laches.**—Laches, if relied on as a defense to an action, ought to be expressly pleaded; it cannot be taken advantage of by demurrer, or its modern equivalent, if it can only be made out inferentially from the statements in the claim. (q)

#### SECTION IV.—ACTIONS FOR SPECIFIC PERFORMANCE.

**General rule against specific performance of agreements for partnership.**—If two persons have agreed to enter into partnership, and one of them refuses to abide by the agreement, the remedy for the other is an action for damages, and not, excepting in the cases to be presently noticed, for specific performance. To compel an unwilling

(o) *Penny v. Pickwick*, 16 Beav. 246. See, too, the recognition of title in *Clements v. Hall*, *ante*, p. 473. than mere laches is necessary to deprive a plaintiff of relief. In *Beningfield v. Baxter*, 12 App. Ca. 167, there was a fiduciary relation.

(p) See, also, *Garden Gully*, etc. Co. v. *McLister*, 1 App. Ca. 39, which shows that in such a case as *Hart v. Clarke* something more (q) See *Deloraine v. Browne*, 3 Bro. C. C. 633; *Mitf. Pl.* 212; *Turner v. Borlase*, 11 Sim. 17.

person to become a partner with another would not be conducive to the welfare of the latter, any more than to compel a man to marry a woman he did not like would be for the benefit of the lady. Moreover, to decree specific performance of an agreement for a partnership at will would be nugatory, inasmuch as it might be dissolved the moment after the decree was made; and to decree specific performance of an agreement for a partnership for a term of years would involve the court in the superintendence of the partnership throughout the whole continuance of the [476] term. As a rule, \*therefore, courts will not decree specific performance of an agreement for a partnership. (r)<sup>1</sup> Nor will specific performance be decreed of an agreement to become a partner and bring in a certain

(r) *Scott v. Rayment*, 7 Eq. 112; *Hercy v. Birch*, 9 Ves. 357; *Sheffield Gas, etc. Co. v. Harrison*, 17 Beav. 294; *Downs v. Collins*, 6 Ha. 418. See, also, *Maxwell v. The Port Tenant Co.* 24 Beav. 495, and *Vivers v. Tuck*, 1 Moore, P. C. N. S. 516, where, however, there was fraud. See, generally, Fry on Spec. Perf. pt. vi, ch. 3, ed. 2.

<sup>1</sup>*Morris v. Peckham*, 51 Conn. 128; *Buck v. Smith*, 29 Mich. 166; *Meason v. Kaine*, 63 Pa. St. 335; *Whitworth v. Harris*, 40 Miss. 483. See, however, *Tillar v. Cook*, 77 Va. 477.

The rule that equity will not decree a specified performance of an agreement for a partnership goes only to the extent that the court will not undertake to compel unwilling parties to act in the relation of partners. An agreement for the future execution of former articles of partnership will be enforced in equity although after they are executed the court cannot compel the parties to act under

them. *Satterthwait v. Marshall*, 4 Del. Ch. 337.

An agreement to enter into a partnership, and as a member of a firm to use and exercise personal skill and judgment in the control and management for the firm of the partnership business, is not enforceable specifically. *Buck v. Smith*, *supra*.

Defendant agreed in writing to repair plaintiff's steam saw-mill, buildings, fences, etc., and plaintiff to sell to defendant, as soon as the repairs were finished, one undivided moiety of the premises on which the mill was situated; plaintiff and defendant then to form a partnership to work the mill for one year, at the end of which time, if plaintiff chose to retire, defendant was to pay him for the premises a fixed sum; but if plaintiff did not choose to retire the partnership was to continue five years. *Held*, not a contract enforceable specifically. *Reid v. Vidal*, 5 Rich. Eq. 289.

amount of capital, or in default to lend a sum of money to the plaintiff. (s)

**Cases in which a decree will be made.**—However, if the parties have agreed to execute some formal instrument which would have the effect of conferring rights which do not exist so long as the agreement is not carried out, in such a case, and for the purpose of putting the parties into the position agreed upon, the execution of that formal instrument may be decreed, although the partnership thereby formed might be immediately dissolved. (t)<sup>1</sup> The principle upon which the court proceeds in a case of this description is the same as that which induces it to decree execution of a lease under seal, notwithstanding the term for which the lease was to continue has already expired. (u)

In *England v. Curling*, (x) the plaintiff and two of the defendants agreed to become partners as ship agents for seven, fourteen or twenty-one years, and they signed with their initials an agreement to that effect. A deed was prepared to carry out the agreement; the deed, however, was never executed, and it differed somewhat from the agree-

(s) *Sichel v. Mosenthal*, 30 Beav. 371.

(t) *Buxton v. Lister*, 3 Atk. 385. And see 1 Swanst. 513, note, and *Stocker v. Wedderburn*, 3 K. & J. 403.

<sup>1</sup> Where H. and W. formed a co-partnership to erect college buildings and to conduct an institution of learning, H. stipulating to use his influence to secure donations to the institution, abandoning a similar enterprise to enter into this partnership, and giving up a pastoral charge at a pecuniary sacrifice, and W. agreeing to convey to H. certain parcels of land upon which the college buildings were to be erected, specific performance of the contract to con-

vey was directed. *Whitworth v. Harris*, 40 Miss. 483.

In *Birchett v. Bolling*, 5 Munf. 442, an agreement to build a tavern in partnership was decreed to be specifically performed at the instance of a partner who furnished the ground for the purpose, and had fully performed the contract on his part, notwithstanding many of the partners were unwilling to carry it into effect, because in their opinion a change of circumstances had rendered the scheme unprofitable.

(u) See *Wilkinson v. Torkington*, 2 Y. & C. Ex. 726, and the cases there cited.

(x) 8 Beav. 129. See the observations of Lord Romilly on this case in 30 Beav. 376.

ment. The parties carried on business as partners under the agreement for eleven years, and then they began to quarrel. The defendant Curling, who appears to have been in the wrong from the beginning, gave notice to dissolve in three months; he retired from the partnership, and entered into partnership with other persons, and carried on business with them on the premises and in the name of [\*477] the old firm. The new firm opened the \*letters addressed to the old one, and gave notice of its dissolution to its correspondents. The plaintiff then filed a bill for specific performance and an injunction, and he obtained a decree. (y)

**Specific performance where an account only is wanted.—**

The only other class of cases in which anything like specific performance of an agreement for a partnership will be decreed is where a person who has agreed with another to share the profit of some joint adventure seeks to obtain that share after the adventure has come to an end. Although the decree giving him the relief he asks may be prefaced by a declaration that the agreement relied upon ought to be specifically performed, this has not the effect of creating a partnership to be carried on by the litigants, but merely serves as a foundation for the decree for an account, which is the substantial part of what is sought and given. An instance of this class of cases is afforded by *Dale v. Hamilton*. (z) There, in substance, three persons had agreed to

(y) The following was the minute of the decree: "The court doth declare that the agreement for a copartnership, dated, etc., is a binding agreement between the parties thereto, and ought to be specifically performed and carried into execution, and doth order and decree the same accordingly. Refer it to the master to inquire whether any and what variations have been made in the said agreement by and with the assent of the several par-

ties thereto since the date thereof. Let the master settle and approve of a proper deed of copartnership between the said parties in pursuance of the said agreement, having regard to any variations which he may find to have been made in the said agreement as hereinbefore directed, and let the parties execute it. Continue the injunction against the defendant Curling."

(z) 5 Ha. 369, and 2 Ph. 266.



purchase land; to build on it and improve it; and then to sell it for their common benefit. Land was accordingly obtained, built upon and improved, and subsequently the right of one of the three persons to any share in the adventure was denied by the other two. He thereupon filed a bill for a sale of the land, for an account of the joint speculation, and for a proper distribution of the moneys arising from the sale; and the court held him entitled to this relief.

Another instance of the same kind is afforded by *Webster v. Bray*. (a) In that case the plaintiff and the defendant had been jointly retained as solicitors to a company.

They were \*not in partnership as solicitors gener- [\*478] ally, but the plaintiff insisted that they were partners as regarded the business done for the company, and that the payments made by the company to each ought to be shared by both. The defendant insisted that there was no partnership, and that each was to be paid for the work done by himself, and to retain for his own benefit all payments in respect of such work. The plaintiff having resigned filed a bill for an account, and the court made a decree in his favor, declaring that the plaintiff and the defendant were jointly and equally interested in the profits and loss of the business transacted by them, or either of them, as solicitors to the company. (b)

#### Other cases of specific performance between partners.—

Relief in the shape of specific performance may be required for other purposes besides carrying into execution agreements to form partnerships. The assistance of a court is often requisite to compel those engaged in a going concern to act conformably to the articles of partnership;<sup>1</sup> and also

(a) 7 Ha. 159.

(b) *Robinson v. Anderson*, 20 Beav. 98, and 7 De G. M. & G. 239, is a similar case.

<sup>1</sup> A court of equity has power, at the suit of one partner, to compel another to contribute a sum stipulated as capital, or to restore it to

the common fund, if he have withdrawn it before the debts are paid; and when a special partner, under a limited partnership, does not pay in the amount of his capital specified in the certificate, and the firm, having become insolvent, assigns their property for the benefit of

to compel those who have dissolved partnership to observe the stipulations into which they have entered. The principles on which the courts act in granting or withholding assistance when sought for the former purpose will be considered hereafter; and with respect to the specific performance, after a dissolution of partnership, of agreements entered into by the partners previously to, or at the time of, dissolution, it need only be observed that relief will be granted or refused upon the principles by which the court is ordinarily guided in questions of specific performance, and that nothing turns on the circumstance of the litigants having been partners. It would therefore be foreign to the objects of the present treatise to prosecute this subject further; but for purposes of reference it may be useful to mention that the court has enforced the following agreements entered into upon or with a view to a dissolution, namely:

Agreements not to carry on business within a certain distance or for a certain space of time; (*c*)

[\*479] \*Agreements as to the custody of partnership books and the furnishing of copies thereof; (*d*)

creditors, the trustee may compel the delinquent partner to pay in the deficiency of his capital. *Robinson v. Davidson*, 3 E. D. Smith, 221.

The owner of a zinc mine agreed with certain other persons to furnish two thousand tons of ore each year for three years, on being paid \$10 per ton therefor; the other persons agreeing to furnish suitable buildings for its conversion into paints, and to divide the profits with the mine owner after a certain time. Under this agreement the mine owner furnished seven hundred and forty-six tons of ore, received for it \$5,860, leaving \$1,600 still due when the other parties refused to receive any more or to appropriate the buildings to the

manufacture, alleging that the business could only prove ruinous to all concerned. The time specified for furnishing the ore had expired; the business was proved to be hazardous, and the buildings and machinery unfit for the manufacture. *Held*, specific performance would not be enforced, because an adequate remedy at law existed for the breach. *Manning v. Wadsworth*, 4 Md. 60.

(*c*) *Whittaker v. Howe*, 3 Beav. 383; *Turner v. Major*, 3 Giff. 442. And see *Coates v. Coates*, 6 Madd. 287, and *Williams v. Williams*, 1 Wils. Ch. 473, note.

(*d*) *Lingen v. Simpson*, 1 Sim. & Stu. 600. And see *Whittaker v. Howe*, 3 Beav. 383.

Agreements that a third party, and he only, shall get in debts; (*e*)

Agreements that the value of the share of an outgoing or a deceased partner shall be ascertained in a specified way and taken accordingly; (*f*)

Agreements that an outgoing partner shall offer his share to his copartners before selling it to other persons; (*g*)

Agreements to grant an annuity to a retiring partner and his widow; (*h*)

Agreements not to divulge or make use of a trade secret. (*i*)

## SECTION V.—ACTIONS FOR MISREPRESENTATION AND FRAUD.

### 1. *General observations.*

The proper remedy for a person who has been induced by fraud to become a partner with another depends in the first place on who the person is who committed the fraud. Speaking generally, and subject to certain qualifications which will be noticed hereafter, if the fraud complained of has been committed by the other partner the person defrauded has the \*option of affirming or of re- [\*480] scinding the contract into which he has been induced

(*e*) *Davis v. Amer*, 3 Drew. 64; *Turner v. Major*, 3 Giff. 442.

(*f*) *Morris v. Kearsley*, 2 Y. & C. Ex. 139; *Essex v. Essex*, 20 Beav. 442; *King v. Chuck*, 17 Beav. 325.

And see *Featherstonhaugh v. Turner*, 25 Beav. 382, and *Gibson v. Goldsmid*, 5 De G. M. & G. 757, reversing *S. C.* 18 Beav. 584. Compare *Downs v. Collins*, 6 Ha. 418, where to have enforced the agreement would have been to decree specific performance of a contract for a contract for a partnership; and *Cooper v. Hood*, 7 W. R. 83, where a decree was refused on the ground that the agreement sought to be enforced was too vague in its terms. See, as to agreements for a valuation, *ante*, p. 432.

(*g*) *Homfray v. Fothergill*, 1 Eq. 567.

(*h*) *Aubin v. Holt*, 2 K. & J. 66; *Page v. Cox*, 10 Ha. 163. See, also, *Murray v. Flavell*, 25 Ch. D. 89, and *Bonville v. Bonville*, 6 Jur. N. S. 414, M. R., where the agreement sued upon was decided not to bear the construction contended for by the plaintiff.

(*i*) *Morison v. Moat*, 9 Ha. 241.

to enter; and whether he affirms it or disaffirms it he is entitled to damages for any loss which he may have sustained by reason of the fraud. (*k*) But if the fraud has been committed by some third person and is not in point of law imputable to the other partner, then the person defrauded has no such option; he cannot rescind the contract; he can only sue those who defrauded him for damages.<sup>1</sup> But it will be observed from this general statement that in cases of this class there is always a preliminary question to be considered, and which, if negatived, leaves the complainant without any redress at all; that question is, Has he in fact been induced by fraud to enter into the contract of which he complains? On this preliminary question a few observations may be useful.

**1. Untruth necessary.**—No attempt is ever made to give any precise definition of fraud, or to restrict by words the circumstances which may be regarded as amounting to it in point of law. New cases of fraud must always be met by new decisions. But by the law of this country a sharp line is drawn between a breach of a promise or the disap-

(*k*) *Small v. Attwood*, You. 507, and 6 Cl. & Fin. 232; *Pulsford v. Richards*, 17 Beav. 87; *Cruikshank v. McVicar*, 8 Beav. 106. And see *Beck v. Kantorowicz*, 3 K. & J. 230, and cases of that class.

<sup>1</sup> When one of a number of persons who, each with the others, agrees to contribute money and form a partnership for a specified purpose, represents to another the existence of facts on which the latter relies, but which do not exist, the other parties are not bound by such representations, and the contract is not thereby invalidated, as between the party deceived and the others. *Kimmins v. Wilson*, 8 W. Va. 584; *Morrison v. Earls*, 4 Can. L. T. 189. See, also, *Geddes' Appeal*, 80 Pa. St. 442.

If, in the course of negotiations between two partners, pending an offer by one to sell out his interest to the other, a third partner, having better opportunities than either of them to form a correct opinion of the value of the interest in question, voluntarily expresses a pretended opinion misrepresenting his real belief, both of the others believing him sincere when he is not, neither of these will be responsible for his want of candor; and however much his pretended opinions (acquiesced in by both) may influence either in the final transaction, the sale will not, on that account, be set aside. *Dortie v. Duzas*, 55 Ga. 484.

pointment of hopes raised by the expression of intentions or expectations, on the one hand, and an untrue statement on the other; (l) and speaking generally there is no fraud sufficient to support an action for damages or to set aside a contract in the absence of some untrue statement of fact or of some concealment of fact which makes what is stated substantially untrue. (m)

**\*2. Untruth must be material and have been \* [481] relied upon.**—In the next place the untrue statement must relate to some material matter, and have been made to the complainant directly, or indirectly as one of the public, (n) and have been in fact relied upon by him. (o)

**3. Whether the untruth must have been known at the time.**—Whether the untrue statement must have been untrue to the knowledge of the person making it has given rise to much controversy. If, indeed, he had no honest belief in its truth his ignorance of its untruth is immaterial. But if he honestly believed it to be true, courts of law and courts of equity have taken different views. It seems, however, now to be settled that, except under special circumstances, an action for damages will not lie in such a case, although an action to rescind a contract founded on

(l) See *Jordan v. Money*, 5 H. L. C. 185; *Harris v. Nickerson*, L. R. 8 Q. B. 236; *Smith v. Chadwick*, 9 App. Ca. 187. *Houldsworth v. City of Glasgow Bank*, 5 App. Ca. 317, is not opposed to this; it turned on the statutory enactments relating to the winding up of companies.

(m) See, as to concealment, *New Sombrero Phosphate Co. v. Erlanger*, 3 App. Ca. 1218, and 5 Ch. D. 73; *Peek v. Gurney*, L. R. 6 H. L. 377, and 13 Eq. 79; *Central Rail. of Venezuela v. Kisch*, L. R. 2 H. L. 99; *Oakes v. Turquand*, id. 325; *New Brunswick, etc. Rail. Co. v. Muggeridge*, 1 Dr. & Sm. 381. See,

also, *Gover's Case*, 1 Ch. D. 182, and the judgment of Fry, J., in *Davies v. Lon. & Prov. Marine Ins. Co.* 8 Ch. D. 474.

(n) That this is sufficient see *Clarke v. Dickson*, 6 C. B. N. S. 435.

(o) See *Smith v. Chadwick*, 9 App. Ca. 187; *Bellairs v. Tucker*, 13 Q. B. D. 562; *Pulsford v. Richards*, 17 Beav. 87, and others of that class. In the remarkable case of *The Panama & South Pacific Telegraph Co. v. India Rubber Co.* 10 Ch. 515, it was held that a contract might be rescinded for fraud subsequent to its date, but rendering its performance impossible.

the statement can be maintained. (*p*) These two classes of actions require further notice.

## 2. *Actions for damages.*

**Actions for misrepresentation.**—Where a person has been induced by the false and fraudulent representations of another to enter into partnership with him, an action will clearly lie at the suit of the first person against the second for the recovery of damages in respect of such fraud. (*q*) And if false representations are made by means of advertisements issued for the purpose of inducing persons to take shares, etc., any person who is ensnared by those advertisements, and acts on the faith of them, may maintain an action against those persons who caused them to be published, knowing them to be false. (*r*) In [\*482] order to maintain an action \*for misrepresentation it is not necessary that there should have been any direct communication between the defendant and the plaintiff. (*s*)

## 3. *Actions for rescission of contract.*

**Rescission of contracts of partnership.**—Where a person is induced by the false representations of others to

(*p*) *Ante*, p. 163 *et seq.* *Slim v. Croucher*, 1 De G. F. & J. 518, has not been followed. The court apparently thought that an action for damages might have been maintained at law. In support of the statement in the text, see *Arkwright v. Newbold*, 17 Ch. D. 301; *Redgrave v. Hurd*, 20 Ch. D. 1; *Newbigging v. Adam*, 34 Ch. D. 582. As to misrepresentations of authority, see *Firbank's Ex. v. Humphreys*, 18 Q. B. D. 54, and the cases there cited.

(*q*) See the cases in the next two notes and *Dobell v. Stevens*, 3 B. & C. 623.

(*r*) *Edgington v. Fitzmaurice*, 29 Ch. D. 459. Compare *Smith v. Chadwick*, 9 App. Ca. 187; *Bellairs v. Tucker*, 13 Q. B. D. 562. Older cases are *Davidson v. Tulloch*, 3 McQu. 783; *Cullen v. Thompson's Trustees & Kerr*, 4 id. 424; *Bale v. Cleland*, 4 Fos. & Fin. 117; *Gerhard v. Bates*, 2 E. & B. 476. And see *Denton v. The Great North. Rail. Co.* 5 E. & B. 860; *Watson v. Charlemont*, 12 Q. B. 856.

(*s*) See *Clarke v. Dickson*, 6 C. B. N. S. 453. And see *Bedford v. Bagshaw*, 4 H. & N. 538.

become a partner with them, the court will rescind the contract of partnership at his instance; and will compel them to repay him whatever he may have paid them, with interest, and to indemnify him against all the debts and liabilities of the partnership, and if the defendants have been guilty of fraud against all claims and demands to which he may have become subject by reason of his having entered into partnership with them, he on the other hand accounting to them for what he may have received since his entry into the concern. (t)<sup>1</sup>

(t) See, in addition to the cases noticed in the text, *Ex parte Broome*, 1 Rose, 71, and 1 Coll. 598, note; *Hamil v. Stokes*, Dan. 20, and 4 Price, 161; *Stainbank v. Fernley*, 9 Sim. 556; *Jauncey v. Knowles*, 8 W. R. 69. *Clifford v. Brooke*, 13 Ves. 131, was not a case of this class; the plaintiff there sought to recover money which he had paid, not for the admission of himself, but for the admission of his brother, into partnership with the defendants. The plaintiff's remedy under these circumstances was held to be by an action at law.

<sup>1</sup> Where one of the parties to an agreement of partnership has been induced to enter into it by the false and fraudulent representations of the other, the partnership may be declared void and the articles canceled. *Hynes v. Stewart*, 10 B. Mon. 429; *Howell v. Harvey*, 5 Ark. 270; *Smith v. Everett*, 126 Mass. 304; *Gibson v. Cunningham*, 92 Mo. 131.

When declared void upon that ground the injured party, except as regards creditors of the firm, should not be regarded as a partner, or subjected to any of the loss sustained by them, and is entitled to redress against the perpetrator

of the fraud to the extent of his injury, unless he has continued the partnership after discovering the fraud. *Hynes v. Stewart*, *supra*.

A court of equity has jurisdiction in such case to restrain the fraudulent party from using the name of the other as a partner; and, having obtained jurisdiction for that purpose, may administer complete relief in the same suit by ordering the former to pay the sums advanced or expended by the latter on account of the partnership. *Smith v. Everett*, 126 Mass. 304.

If a court of equity finds a contract of partnership to be void in its inception, on account of the fraud of one partner in inducing the other to enter into the partnership, it may award as damages that the fraudulent partner shall repay to the other all sums of money the latter has paid into the firm as his portion of the capital stock; pay him a reasonable compensation for the time he has acted as copartner, and indemnify him for all liability arising out of the business in which they have been engaged. *Richards v. Todd*, 127 Mass. 167; *Merchants' Bk. v. Thompson*, 3 Ont. 541.

The defendant, under an oral agreement with the plaintiff, which

The case of *Pillans v. Harkness* (u) affords a good example of this. In that case the plaintiff was induced by

was void under the statute of frauds, obtained possession, by purchase, of certain property belonging to the plaintiff, as part of the plaintiff's contribution to a business, which such agreement provided that the defendant should prosecute for their common benefit. *Held*, that when the defendant refused to carry out the agreement, but used the property so purchased for his own exclusive profit, equity might compel the restoration thereof to the plaintiff on such terms as should be just. *Redfield v. Widdleton*, 1 Robt. 79.

A court of equity, in a suit for a dissolution of a partnership, cannot take cognizance of a claim of one of the partners complainant against the partner defendant, for damages for alleged fraud of such defendant partner, consisting of alleged false representations as to the utility of certain machinery to be used by the firm, and as to his ability to conduct it successfully and profitably. The remedy is at law. *Maude v. Rodes*, 4 Dana, 144.

Where one partner files a bill against his several partners for a settlement of the partnership accounts and his share of the profits, a fraud perpetrated by him on one of the defendants, in a former partnership between them individually, by means of which he procured the funds contributed as his share of the capital of the new firm, is no ground for annulling or rescinding

the contract of partnership. *Ingraham v. Foster*, 31 Ala. 123.

The right of a partner contracting to buy a part of the property used in the partnership business, from the other partner, to abandon the contract of purchase unexecuted, does not carry with it the right to abandon the executed contract of partnership respecting the same property and recover from the other for services rendered the firm. *Gullich v. Alford*, 61 Miss. 224.

An erroneous estimate of business profits is not ground for rescission of the contract of partnership. *Whelen v. Harrison*, 40 Leg. Intel. 170; S. C. 16 Phila. 143.

Where one becomes a partner of one firm on the faith that the firm in question intends to form a syndicate arrangement with another firm, which arrangement fails to be carried out for want of the concurrence of some of the members of the other firm, he is entitled to be relieved from his agreement to become a partner. *Merchants' Bank v. Thompson*, 3 Ont. 541.

If, through fraudulent representations of the promoter of a corporation, a person subscribes for stock and pays his subscription to the treasury, he cannot by rescinding the contract maintain an action for money had and received against the other shareholders, even if the corporation is invalid and the shareholders partners. *Perry v. Hale*, 143 Mass. 540.

The neglect of a partner to pro-

(u) *Colles*, 442 (called *Harkness v. Steward*, and *Steward v. Harkness*, in the table of cases to the Dublin edition of 1789).



the fraud of the defendants to enter into partnership with them in a fishing business. They got money from him, but contributed nothing themselves; they nevertheless induced him to sign a deed stating that they had bought in their shares of capital. They deceived him for two years, and referred him, when pressed, to books which, when examined, were found without any entry in them. The plaintiff then filed a bill against his partners for a \*dis- [\*483] covery of their transactions and for the recovery of his money. (x) The chancellor decreed them to account for all moneys paid by the plaintiff to them or either of them, and to pay what should appear due to him with interest, the plaintiff to be absolutely discharged from the articles, agreements and partnerships, the defendants to indemnify him from all costs and damages whatsoever touching the articles, or any partnership in respect thereof, and to pay the costs of the suit. This decree was affirmed on appeal to the house of lords.

**Although the plaintiff might have ascertained the truth.**—Another case of the same description is *Rawlins v. Wickham*. (y) There the plaintiff was induced by the misrepresentations of two persons, A. and B., to enter into

to protect the firm property is not ground for rescission, although it would be for dissolution, and the loss, if any, arising from such neglect may be charged to the negligent partner. *Whelen v. Harrison*, 40 Leg. Intel. 170; S. C. 16 Phila. 143.

A deception practiced by one partner on another has no effect upon their obligations to third persons who are not privy to it. *Seawell v. Payne*, 5 La. Ann. 255.

The liability of a dormant partner, however, may, it is held, be avoided by proof of fraud in forming the partnership, if no part of the funds have been received by such dormant partner. *Mason v. Connell*, 1 Whart. 381.

(x) The defendants relied on the lapse of time and laches and acquiescence on the part of the plaintiff; and particularly on the fact that he had entered into another agreement with them to the effect that the defendants should become partners in another fishing concern and share their profits in that with the plaintiff, and that such partnership had been entered into. The evidence, however, failed to show that the plaintiff had any knowledge of this alleged other partnership, or that he was aware of what had been going on until shortly before he filed his bill.

(y) 1 Giff. 355, and 3 De G. & J. 304.

partnership with them as bankers, and he and they, after carrying on their business for four years, transferred it to other parties. Shortly after this transfer the plaintiff for the first time became aware of the falsity of the statements by which he had been induced to become a partner. He brought an action against A. and B. for their misrepresentations; pending the proceedings at law A. died, but the action was continued against B., and a verdict against him for damages was obtained. After the verdict B. became insolvent, and thereupon the plaintiff filed a bill against B. and the executors of A., praying that the partnership into which he had entered might be declared void; that the partnership articles might be canceled; that the defendants might be decreed to repay him the sum paid by him on entering into the partnership, with interest, and to execute a sufficient indemnity against the outstanding debts and liabilities which the plaintiff had or might become subject to in respect of the dealings and transactions of the partnership, and for an account of such debts and liabilities, and of the moneys already paid \*by the plaintiff on account of the partnership debts, and for repayment of such moneys with interest. A decree was made in the plaintiff's favor, and an appeal by A.'s executors was dismissed. In this case the deceased partner had clearly been a party to the misrepresentation; and although it was proved that he was ignorant of the real truth, and had not stated that to be true which he knew to be false, still it was held that he ought not to have stated what he did not know to be true, and that he was answerable for the falsity of his own assertions. It was also held that the plaintiff was entitled to assume that the statements made to him were true until he had reason to suppose that they were not; and that it was no answer to him that if he had examined the partnership books he would have discovered the true state of affairs. (z)

(z) See, also, *Jauncey v. Knowles*, means of knowledge. Compare 8 W. R. 69, where there was also *Jennings v. Broughton*, 17 Beav.

**Extent of indemnity — Lien for purchase money, etc.—** *Newbigging v. Adam* (a) and *Mycock v. Beatson* (b) are more recent illustrations of the same doctrine. In the first of these cases it was held that where there is a right to rescind for misrepresentation, but not fraudulent, the right of the plaintiff to indemnity is less extensive than it is where he is in a position to claim damages for a fraudulent misrepresentation. In the second of the above cases the plaintiff was held entitled to a lien on the partnership assets (after satisfying the debts and liabilities) for the money he had paid on entering into the partnership; and also to stand in the place of any creditor of the partnership whom he paid off.

**Rescission of contracts made on a dissolution of partnership.**— Besides being called upon to rescind agreements for the formation of a partnership, courts are frequently applied to by partners, or those claiming under them, to rescind agreements of other descriptions, and especially agreements come to on or after a dissolution.

**\*Bad bargain not set aside if there has been no [485] fraud.**— Supposing every member of a firm to be *svi juris*, any one may retire upon any terms to which he and his copartners may choose to assent; and, if there is no fraud or concealment on either side, all will be bound by any agreement into which he and they may enter, although it may ultimately turn out that a bad bargain has been made.<sup>1</sup>

234, and 5 De G. M. & G. 126, where the plaintiff did not rely on the defendant's statements.

(a) 34 Ch. D. 582. The defendants were declared "jointly and severally bound to indemnify the plaintiff against all outstanding debts, claims, demands and liabilities which the plaintiff had become or might become subject to, or be liable to pay for or on account or in respect of the dealings and trans-

actions of the partnership;" not necessarily equivalent to an indemnity against the consequences of having entered into the partnership. See the judgment of Bowen, L. J.

(b) 13 Ch. D. 384.

<sup>1</sup> A settlement of partnership accounts, and the sale by one partner to another of his interest, fairly and deliberately made, and evidenced by their written agreement,

For example, in *Knight v. Marjoribanks* (c) certain persons were partners in a speculation in Australia. The speculation was not at first successful, and it was necessary for the partners frequently to contribute large sums of money for the purpose of carrying it on. The plaintiff, who was one of the partners, was greatly pressed for money, and was unable to contribute his proportion of the required capital. A sum of upwards of 5,000*l.* was alleged to be due from him to the concern; he never questioned the accuracy of this statement, but assented to its correctness, and he never examined or sought to examine any books or accounts; and in consideration of the sum so alleged to be due, and of 250*l.* cash, he assigned all his interest in the concern to his copartners, and released them from all demands. The speculation afterwards proving profitable, he sought to set aside this transaction on the ground of fraud and inadequacy of consideration. But as no fraud was proved, as the plaintiff knew very well what he was about, as he was content that no accounts should be taken, and that no person should act as his adviser, and as, although he was undoubtedly in distress, and his copartners knew it, yet they had taken no unfair advantage of that circumstance, it was held both by Lord Langdale, and by Lord Cottenham on appeal, that the transaction was binding and could not be impeached. (d)

Any arrangement which, on the principle here adverted to, is binding on the partners themselves, will also, as a

signed and sealed, will not be set aside for slight and trivial reasons. *Gage v. Parmelee*, 87 Ill. 329.

Where partners in an iron furnace, through a third person, bought the interest of a fellow, concealing that the purchase was for them, held, that this was not *per se* fraudulent; nor was his allegation in a bill in equity, brought six years afterwards, that a fellow, at the time of the sale,

represented the seller's interest as being of less value than it was, a ground for relief. *Geddes' Appeal*, 80 Pa. St. 442.

(c) 11 Beav. 322, and 2 Mac. & G. 10.

(d) See, also, *Ex parte Peake*, 1 Madd. 346; *Ramsbottom v. Parker*, 6 Madd. 5; *M'Lure v. Ripley*, 2 Mac. & G. 274; *Cockle v. Whiting*, Taml. 55.

general rule, be binding as between the trustee in bankruptcy or executors of the retiring partners on the one hand, and the continuing partners and their trustees or executors on the \*other. (*e*) But as regards trustees in [\*486] bankruptcy, it must not be forgotten that they can set aside arrangements entered into in fraud of creditors, although such arrangements may be binding as between the parties to them and their respective executors. (*f*)

**Agreements made on a dissolution and based on false accounts.**—Notwithstanding the inability of a retiring partner, and of those claiming under him, to avoid an agreement fairly come to between him and his copartners, the good faith and open dealing which one partner has a right to expect from another never require to be more scrupulously observed than when one of them is retiring upon terms agreed to upon the strength of representations as to the state of the partnership accounts; and an agreement entered into on a dissolution will be set aside if it can be shown to have been based upon error or to have been tainted by fraud, whether in the shape of positive misrepresentation or of concealment of the truth. Thus, in *Chandler v. Dorsett*, (*g*) the plaintiff and the defendant dissolved partnership; an account was drawn up by the defendant, who made it appear that there was a balance against the plaintiff. The plaintiff gave his note for the amount of this balance, and afterwards, having discovered mistakes in the account, filed a bill for a new account. The defendant pleaded an account stated; but the court decreed that the defendant should come to a new account, and that what should appear to be due on taking it should be paid with interest. So, in *Spittal v. Smith*, (*h*) where the plaintiff was

(*e*) *Ex parte* Peake, 1 Madd. 346; & B. 40; *Warden v. Jones*, 23 Beav. Ramsbottom *v.* Parker, 6 Madd. 5; 497; *Heilbut v. Nevill*, L. R. 4 C. Luckie *v.* Forsyth, 3 Jo. & Lat. P. 354; affirmed, 5 C. P. 478. 388.

(*g*) Finch, 431. See, too, *Madde-*

(*f*) See *Anderson v. Maltby*, 2 Ford *v.* Austwick, 1 Sim. 89. Ves. Jr. 255; *Billiter v. Young*, 6 E. (h) Taml. 45.

entitled to a share of the produce of a whaling voyage, and the defendant paid him a sum of money as his share, for which the plaintiff gave a receipt, it was held that, as there had been concealment on the part of the defendant, the plaintiff was entitled to an inquiry as to whether certain deductions which had been made were proper.

**Arrangements with an expelled partner.**—As has been more than once observed in the course of the present [\*487] \*treatise, the principle illustrated by the foregoing decisions apply most strongly to the case of a partner who is expelled by the others. Powers of expulsion are always construed strictly, and, unless they are exercised with perfect good faith, the expulsion will be declared void, and the partner wrongfully expelled will be restored to his position, and will not be held bound by accounts which may have been signed by him in ignorance of material facts. (i)

**Agreements made with the representatives of a deceased partner.**—Hitherto the arrangement entered into and afterwards called in question has been supposed to have been made between the partners themselves. But more difficulty arises when an arrangement is entered into between the representatives of a deceased partner on the one hand and the continuing partners on the other. Two cases have here to be considered, according as the representative of the deceased is or is not himself a partner in the firm.

**1. Where the representative is not himself a partner.** If an executor of a deceased partner is not a member of the firm it is competent for him and the surviving partners to agree that the share of the deceased shall be ascertained in a particular way or be taken at a certain value. And, although it has been said that the creditors or other persons interested in the estate of the deceased may impeach such an agreement by instituting proceedings against the sur-

(i) See *Blisset v. Daniel*, 10 Ha. Woad, L. R. 9 Ex. 190. See, also, 538. As to damages, see *Wood v. Russell v. Russell*, 14 Ch. D. 471.

living partners and the executors of the deceased, (*k*) still agreements of the kind in question cannot be successfully impeached unless there has been some fraud or collusion between them and the executors. In *Davies v. Davies*, (*l*) Lord Langdale observed:

“It has been said, in the course of the argument, that, in a suit constituted as this is against the executor and surviving partner of the testator for an account of the partnership transactions, it was not necessary to prove the fraud and collusion which are charged in the bill, and the case of *Bowsher v. Watkins* was cited in support of that proposition. I well recollect that there were special circumstances which induced Sir John Leach to come to the conclusion he did in that case, and that the decision was far from establishing the general proposition that in every case a bill might be \*filed against an ex- [\*488] ecutor and surviving partner of a testator without charging and proving fraud or collusion. In this case there are no special circumstances. It is a bill filed by persons beneficially interested in the testator's estate against the executor and the surviving partner, and it seeks to have the partnership accounts now. The defendant, the surviving partner, by his plea avers that an account was settled with the executor on the 31st of December, 1832, and that, if unimpeached, is a sufficient defense to the bill.”

Later cases are in conformity with this decision. (*m*)

**Effect of fraud and collusion.**—If there has been fraud or collusion between the surviving partners and the executors of the deceased partner the case naturally assumes a different aspect, and any arrangement between them will be liable to be set aside at the instance of the persons interested in the estate of the deceased. (*n*) And, even although there be no fraud or collusion, still, if the executor has obtained less than the true value of the deceased's share in

(*k*) See *Bowsher v. Watkins*, 1 R. & M. 277; *Gedge v. Traill*, id. 281. (*l*) 2 Keen, 539.

(*m*) *Chambers v. Howell*, 11 Beav. 6; *Stainton v. The Carron Co.* 18 Beav. 146. And as to accounts settled by one of several executors, *Smith v. Everett*, 27 Beav. 446.

(*n*) As in *Cook v. Collingridge*, Jac. 607; *Rice v. Gordon*, 11 Beav.

265. See, also, *Beningfield v. Baxter*, 12 App. Ca. 167. Less than fraud or collusion will justify an action against an executor of a deceased partner and the surviving partners (*Travis v. Milne*, 9 Ha. 141), but will not, it is apprehended invalidate arrangements into which they may have entered for payment of the share of the deceased.

the partnership estate, the executor may be liable as for a *devastavit*, although the surviving partner may be protected against all demands. But if, in a case of difficulty, the executor has acted with a *bona fide* view to do his best for the estate he represents, the court will not be willing to make him account for what, without his wilful default, he might have received from the surviving partners. (o)

**2. Where the representative is himself a partner.**— If a partner dies and leaves his copartner his executor, much greater difficulty is met with than in the case last supposed. By the present hypothesis the executor is invested with two characters, and his interest as surviving partner is often in conflict with his duty as representative of the deceased. This conflict of duty and of interest renders it almost impossible for the executor to enter into any arrangement with respect to the share of the deceased in the [\*489] partnership estate which \*those interested in that share may not afterwards succeed in setting aside. (p)

In *Wedderburn v. Wedderburn*, (q) a leading case on this subject, an account of a deceased partner's estate was directed after a lapse of thirty years, and repeated changes in the firm, and after several deeds and a release had been executed by the parties beneficially interested. The surviving partners were the executors of the deceased and were guardians of the persons beneficially entitled to his share, and the settlements and releases were executed in ignorance of the true state of the partnership accounts. So in *Millar v. Craig*, (r) where one partner died leaving four executors, of whom two were members of the firm, an account was settled between the executors and the residuary legatees, and releases were executed, but errors having been proved in the accounts, the releases were set aside and

(o) See *Rowley v. Adams*, 7 Beav. 395, and 2 H. L. C. 725.

(q) 2 Keen, 722, and 4 M. & Cr. 41.

(p) See *Cook v. Collingridge*, Jac. 607.

(r) 6 Beav. 433. In this case no question was raised as against the partners who were not executors.



the accounts were re-opened. Again, in *Stocken v. Dawson*, (s) a partner, by his will, authorized a sale of his share to his copartner, whom he appointed one of his executors. The surviving partner purchased the share of the deceased at a valuation, but the purchase was set aside at the suit of the son of the deceased after a lapse of seven years. So in *Rice v. Gordon*, (t) where a partner died, some of his copartners obtained administration to his estate and sold part of the assets of the deceased to another of the partners, but at an undervalue; the sale was set aside at the suit of a creditor.

**Difficult position of representative.**—In all these cases there was some ground for setting aside the arrangement made by the executors in addition to the mere fact that they were also surviving partners. But, as observed by Lord Eldon in *Cook v. Collingridge*, (u) “one of the most firmly established rules is that persons dealing as trustees and executors must put their own interest entirely out of the question, and this is so difficult to do in a transaction in which they are dealing with themselves that the court will not \*inquire whether it has been done or [\*490] not, but at once says such a transaction cannot stand.” (x)

**Right of retainer out of assets.**—However, a surviving partner, who is the executor of his deceased copartner, may retain out of his assets what is due from the deceased to himself on taking the partnership accounts. (y)

**Loss of right to rescind.**—Assuming that, on the principles above explained, a person has a right to rescind a contract on the ground of misrepresentation, he may lose that right in one of two ways, viz., 1, by his own laches; and 2,

(s) 9 Beav. 239.

(t) 11 Beav. 265.

(u) Jac. 621.

(x) The position of the executors of the deceased partner will be examined at length hereafter, and

the subject above noticed will be again adverted to on that occasion.

(y) *Morris v. Morris*, 10 Ch. 68,

where the accounts were still unsettled.

by disabling himself from restoring what he may himself have received.

A person entitled to rescind a contract for fraud loses his right if he does not repudiate the contract within a reasonable time after the discovery of the fraud; (z) and, *a fortiori*, if after such discovery he does anything to affirm the contract, or anything which is inconsistent with his right to rescind it; *e. g.*, if, in the case of shares fraudulently sold to him, he attempts to resell them, (a) or continues to act as shareholder. (b)

**Rescission in toto.**—Further, a person induced by fraud to enter into a contract cannot rescind it unless he is himself able to rescind it *in toto* and to restore the other party to his former position, or unless his inability so to do is attributable to that party. (c) But if the contract is severable, inability to rescind it as to part is not fatal to the right to rescind it as to another part. (d)

**Liability to creditors.**—It must be remembered that a contract induced by fraud is voidable only and not void.

Consequently a person induced by fraud to become [\*491] a partner is liable to all creditors of the \*firm in respect of its dealings with them whilst he is a partner. (e)

(z) See, on this subject generally, *Clough v. L. & N. W. Rail. Co.* L. R. 7 Ex. 35, and as instances of repudiation being too late see *Denton v. Macneil*, 2 Eq. 352; *Ashley's Case*, 9 Eq. 263; *Scholey v. Central Rail. Co. of Venezuela*, *id.* 266, note. Compare *Macniell's Case*, 10 Eq. 503; *Campbell v. Flemings*, 1 A. & E. 40.

(a) *Briggs' Case*, 1 Eq. 483.

(b) *Sharpley v. Louth and East Coast Rail. Co.* 2 Ch. D. 663.

(c) See *Urquhart v. McPherson*, 3 App. Ca. 831, a deed of dissolution and release. See also, *Phosphate Sewage Co. v. Hartmont*, 5

Ch. D. 394; *Laing v. Campbell*, 36 Beav. 3; *Clarke v. Dickson*, E. B. & E. 148; *Maturin v. Tredinnick*, 2 N. R. 514, and 4 *id.* 15.

(d) See last note.

(e) See *Ex parte Broome*, 1 Rose, 69; *Jeffreys v. Smith*, 3 Russ. 158; *Macbride v. Lindsay*, 9 Ha. 574; and as to shareholders in companies, *Reese River Mining Co. v. Smith*, L. R. 4 Ho. Lo. 70; *Henderson v. The Royal British Bank*, 7 E. & B. 356; *Daniell v. The Royal British Bank*, 1 H. & N. 681; *Powis v. Harding*, 1 C. B. N. S. 533; *Howard v. Shaw*, 9 Ir. Law Rep. 335.

## SECTION VI.—ACTIONS FOR DISSOLUTION, ACCOUNT, ETC.

The remedy for a partner who insists on a dissolution which is opposed by his copartners was formerly [and in those states in which the distinction between courts of law and equity is still maintained is still] by a suit in equity, and is now by an action which should be brought in the chancery division of the high court. (*f*) Actions involving the taking of partnership accounts should also be brought in the same division.<sup>1</sup>

(*f*) Jud. Act, 1873, § 34.

<sup>1</sup> See *Christy's Appeal*, 92 Pa. St. 157; *S. C.* 37 Leg. Intel. 364; *Lightner v. Penn. Co.* 41 Leg. Intel. 386; *Holt v. Simmons*, 16 Mo. App. 97; *Hodges v. Black*, 8 Mo. App. 339. See *Squiar v. Ford*, 7 So. West. Rep. (Ky.) 152.

A court of chancery has jurisdiction of a bill for a discovery and account of fees collected in a partnership business in the practice of law. *Denver v. Roane*, 99 U. S. 355.

Probate proceedings for discovery do not bar an otherwise proper suit in equity for winding up the concerns of the partnership. *Perrin v. Lepper*, 49 Mich. 347.

The orphans' court has no jurisdiction to settle the accounts between a deceased partner's estate and the surviving partner. *Bentley's Estate*, 16 Phila. 263.

The rights and liabilities of alleged partners *inter se*, and as to third parties, cannot be determined upon exceptions filed by a creditor against the claim of an executor who was a member of the firm, to share in the proceeds of said firm, on account of assets of the estate held by said firm. *McCracken v. Milhous*, 7 Bradw. 169.

Proceedings between partners for an accounting are always for the principal\* purpose of reaching a statement of money balances and a division of assets as personalty, and being essentially a personal and not a real controversy may be carried on in courts within whose jurisdiction the parties live and do business, irrespective of the location of partnership lands. *Godfrey v. Whits*, 43 Mich. 171.

It is error, in an action at law, to undertake in a judgment to adjust equities of a creditor of the defendant firm by postponing the payment of the judgment. *Wilson v. Benedict*, 7 West. R. 99.

Where, however, a mistake is made in the computation of a balance upon settlement after dissolution, party entitled may recover the actual difference due him upon a correct computation according to the terms of settlement in an action at law. *Donahue v. McCosh*, 70 Ia. 733.

As to what a bill for accounting should allege, see *McAndrew v. Walsh*, 31 N. J. Eq. 331.

The items of the account need not be stated on a complaint seeking a dissolution and accounting; it is enough to state the gross

In an action for dissolution the statement of claim should claim a dissolution and an account, and also an injunction and a receiver to restrain the defendants from dealing with the partnership assets and from issuing bills or notes in the name of the firm.<sup>1</sup> Such an action lies although the partnership be a partnership at will and can therefore be dissolved by the plaintiff himself; (*g*) but if the partnership has been dissolved before action the plaintiff should claim a declaration to that effect. (*h*) If the partnership is admitted and the right to dissolve is not contested, the court will decree a dissolution on motion before the hearing or trial. (*i*) An action may be brought for rescission of the contract of partnership or in the alternative for dissolution of the partnership. (*j*)

An action for the dissolution of an ordinary partnership may be maintained although the partnership is one which may be wound up under the statutory jurisdiction conferred by the Companies Act, 1862; (*k*) but practically it is more convenient to have recourse to that act where it applies.

The grounds on which the court will dissolve a partner-

amount due the plaintiff. *Kimball v. Seal*, 92 Ind. 276.

A bill for an account may be sustained without a prayer for a dissolution of partnership. *Von Yagen v. Roberts*, 2 Pearson (Pa.), 137.

A dissolution may be decreed under a prayer for general relief. *Hall v. Lonkey*, 57 Cal. 80.

Pleadings and evidence in an action for settlement and dissolution of partnership considered. *Curry v. Allen*, 55 Ia. 318.

Where the partners to a bill for an account have agreed by their pleadings that their firm was dissolved before suit was brought neither can afterwards claim the contrary. *Candler v. Stange*, 53 Mich. 479.

The practice in a suit to set aside

partnership settlements stated. *Keough v. Foreman*, 33 La. Ann. 1434.

As to the proper practice in a bill for an account by an heir of a deceased partner against the surviving partners and the administrator of the deceased, see *Dampf's Appeal*, 106 Pa. St. 72; S. C. 16 Weekly Not. Cas. 6; 41 Leg. Intel. 430.

<sup>1</sup> See *post*, Injunction, Receiver.

(*g*) *Master v. Kirton*, 3 Ves. 74.

(*h*) The date of the dissolution depends on circumstances. See *infra*, book iv, ch. 1.

(*i*) *Thorp v. Holdsworth*, 3 Ch. D. 637, where the terms of the partnership were in dispute.

(*j*) *Bagot v. Easton*, 7 Ch. D. 1.

(*k*) *Jones v. Charlemont*, 16 Sim.

271; *Clements v. Bowes*, 17 id. 167.

\*ship; (l) and the mode of winding up the affairs of [\*492] a partnership in the event of death or bankruptcy will be examined in Book IV; in the present place it is proposed to deal with the subjects of account and discovery, injunctions, receivers, sale of partnership property.

### 1. *Of account and discovery.*

Under this head it is proposed to consider, with reference to partners and persons claiming under them—

1. The right to an account and discovery generally.
2. The defenses to an action for an account and discovery.
3. The judgment for a partnership account.

(a) *Of the right to an account and discovery generally, as between partners and those claiming under them.*

**1. Action for an account.**—*As to account.*—The right of every partner to have an account from his copartners of their dealings and transactions is too obvious to require comment. An action for an account may be maintained by partners although the partnership accounts are not complicated, (m) and although an action for damages may be sustainable, (n)<sup>1</sup> and although the defendant may have

(l) As to fraud, see *ante*, p. 479 *et seq.*

(m) *Cruikshank v. M'Vicar*, 8 Beav. 106. See *Frietas v. Dos Santos*, 1 Y. & J. 574.

(n) *Wright v. Hunter*, 5 Ves. 792, where the bill was for contribution; *Blain v. Agar*, 1 Sim. 37, and 2 *id.* 289, where the bill was for the recovery back of deposits. See, too, *Townsend v. Ash*, 3 Atk. 336, as to the profits of partnership real estate.

<sup>1</sup>See, generally, *Meredith v. Ewing*, 85 Ind. 410; *Thompson v. Walker*, 2 So. Rep. (La.) 789.

One partner may maintain an

action for an account against another to determine the interest of each in partnership land, the title of which is held by the defendant. *Tenney v. Simpson*, 37 Kan. 579.

One partner is entitled to an account from the partner who, by agreement, received the assets and settled the affairs of the firm, notwithstanding such party paid out more than he received. *Sharp v. Hibbins*, 42 N. J. Eq. Rep. 543.

The right of one partner, as against his copartner, to require the settlement of partnership accounts, is simply a right to an

accounting after dissolution; and

stolen or embezzled the money of the firm. (o) Moreover, although formerly the court of chancery would not entertain a suit for damages merely, although the suit was in

such liability will not serve as a legal consideration of or an express promise from one partner to another. *Martin v. Stubbings*, 20 Bradw. 381.

As to the settlement of a firm which it is proposed to change into a corporation, where certain parties have paid assessments but the corporation has never been formed, see *Fletcher v. Reed*, 131 Mass. 312.

The remedy upon a note given by one partner and his wife to his copartner, in excess of a true balance in favor of such partner, upon an agreement that if, upon a final accounting, the amount due such partner should be found less than such note it should be subject to such difference, is in equity and not at law. *Martin v. Stubbings*, 20 Bradw. 381.

In matters of difficulty or controversy between partners it is most usual, and by far the most convenient, to resort to a court of equity for their final adjudication and settlement. *Bracken v. Kennedy*, 3 Scam. 558.

To effect a complete adjustment of copartnership concerns the extraordinary powers of a court of chancery may be necessary; and, when necessary for that purpose, it will entertain jurisdiction whether an action of account would or would not lie between the parties. *Gillett v. Hall*, 13 Conn. 426.

The jurisdiction of courts of equity extends to the settlement

of partnership accounts, however small may be the number of partners, where a court of law cannot make a complete and final adjustment of the partnership concerns by reason of its inability to furnish the peculiar relief necessary for that purpose. *Niles v. Williams*, 24 Conn. 279.

A court of equity will not compel an account of partnership dealings, when a suit at law is pending, in which the same should be adjusted and settled, unless the aid of the court is necessary to ascertain the particulars of the account. *Hunt v. Gookin*, 6 Vt. 462.

A bill by one of a former partnership against another for a debt due on account stated, and not asking a settlement of partnership accounts, cannot be sustained until the plaintiff has exhausted his remedy at law. *Bethell v. Wilson*, 1 Dev. & B. Eq. 610.

As to what allegations a bill for the settlement of partnership accounts should contain, see *Glover v. Hembree*, 82 Ala. 324.

Upon a bill by one partner against another for an account the first thing to be determined is whether the parties are in equity required to account. When this is so found the case should be referred to the master to hear the evidence and state an account; until the case comes before the master there is no necessity to take evidence as to the state of the accounts. *Ligare v. Peacock*, 109 Ill.

---

(o) *Roope v. D'Avigdor*, 10 Q. B. D. 412.

form a suit for an account, (p) yet in a partnership suit involving a general account claims were adjusted which in ordinary cases would have formed the subject of an action

94; *Collyer v. Collyer*, 38 Pa. St. 257.

Membership of a partnership and consequent liability as partner must be settled before equities between the parties will be investigated in a court of equity. *Nims v. Nims*, 20 Fla. 204; *Christy's Appeal*, 92 Pa. St. 157; S. C. 37 Leg. Intel. 364; *McCall v. Moschowitz*, 10 N. Y. Civ. Proc. 107.

A judgment in an action for a dissolution and accounting which, after finding there was no copartnership, dismissed the complaint, is not a bar to a subsequent action to recover plaintiff's share of the profits made in the business enterprise. *Marsh v. Masterson*, 50 N. Y. Super. Ct. 187.

In the case of *Harvey v. Penny-packer*, 4 Del. Ch. 445, it is stated that a court of equity will not, upon the dissolution of a partnership, direct the taking of partnership accounts, unless there is some necessity for its interposition. Proper occasions for the court's interference stated.

A copartnership being established and profits shown to have accrued and to be in the hands of either partner, for which he refuses to account, the court of chancery will compel an accounting. *Gates v. Fraser*, 6 Bradw. 229.

Where, after dissolution, all the assets are left in the hands of one partner to settle the firm affairs,

the retiring partner is entitled to an accounting, although the evidence shows that the defendant has paid out more in satisfaction of the firm debts than he has received from the assets. *Sharp v. Hibbins*, 9 Atl. R. 113.

A bill will not lie to compel defendants to admit plaintiff to participation in the benefits of a purchase, unless there is sufficient mutuality between the parties to enable the defendants to have brought in the plaintiff to share their losses if any had resulted in the transaction. *Porter v. Kinsey*, 14 Phila. 233.

When a partner, on demand, refuses to account with his copartner, a suit for a dissolution and an accounting may be maintained, and the complaint need not aver either the amount put in or taken out by either partner. *Kimball v. Seal*, 92 Ind. 276. See, also, *Meredith v. Ewing*, 85 Ind. 410.

The death of one partner after dissolution, specific claim for contribution for expenses as to one asset and denial thereof, and the existence of outstanding assets uncollected, afford no reason for refusing an interlocutory judgment for an account. *Martin v. Smith*, 53 N. Y. Super. Ct. 277.

A partner who has sold out his interest in the firm, with an agreement that he should be exonerated of all his firm debts, present and

(p) *Duncan v. Luntley*, 2 Mac. & G. 30, where shares had been wrongfully sold by the secretary

of a company. See, also, *Clifford v. Brooke*, 13 Ves. 132.

at law; (q) and it is apprehended that now the court will in taking such an account deal with every claim [\*493] which it may be \*necessary to investigate in order

future, who has been compelled to pay certain debts of the firm, cannot maintain a bill in equity for an account and reimbursement, there being a complete and adequate remedy at law. *Clarke's Appeal*, 107 Pa. St. 436.

The fact that a partner has sold his interest to a third person, agreeing to receive from him a certain sum per month until fully paid, does not deprive him of the right to file a bill against his copartner for dissolution and account. *Russell v. White*, 29 N. W. R. 865; S. C. 6 West. R. 143.

Where, in the conduct of the firm business, debts were contracted with defendant bank, to secure which collaterals were deposited in excess of the same, to the end that the residue might be applied to other partnership debts on execution of plaintiff, who was sole owner by assignment of his associate, *held*, that an account was properly ordered. *Chalk v. Bank*, 87 N. C. 200.

One partner cannot, by wrongfully terminating the contract of partnership and tortiously seizing the joint property, create a right to compel an accounting in equity with reference to the operations after possession taken or as to the avails of property wrongfully converted. *McGraw v. Dole*, 29 N. W. R. 477; S. C. 5 West. R. 585.

The fact that a contract of partnership entered into by a corpora-

tion with another party is *ultra vires* as to the corporation will not avail such corporation as a defense to an action for an account so far as the contract has been executed and moneys applied to its own use to which it was entitled. *Standard Oil Co. v. Scofield*, 16 Abb. N. C. 372.

As to when an action for an account founded on a covenant in the articles under seal should be brought, see *Dwinelle v. Edey*, 12 Daly, 253.

As to when one partner may maintain an attachment against his copartner in an action for an account, see *Stone v. Boone*, 24 Kan. 337; *Curry v. Allen*, 55 Iowa, 318; *Humphreys v. Matthews*, 11 Ill. 471; *Ketchum v. Ketchum*, 1 Abb. Pr. (N. S.) 157; *Goble v. Howard*, 12 Ohio St. 165; *Brinegar v. Griffin*, 2 La. Ann. 154; *Johnson v. Short*, id. 277.

During the pendency of a bill in equity by two of four partners against the other two for an accounting, the second two cannot bring a bill against the first two for the same purpose. *Wallace v. Robinson*, 52 N. H. 286.

A bill in equity, filed by one partner against his insolvent copartner in the business of carrying on a farm for one year, asking a settlement of the partnership accounts, and the foreclosure of a mortgage executed by the defendant partner on his share of the crop

---

(q) See *Bury v. Allen*, 1 Coll. 67, note (o). Compare *Great Western Ins. Co. v. Cunliffe*, 9 Ch. 525.



to adjust and finally settle the account.<sup>1</sup> But disputes not affecting the account will naturally be excluded from it.

to be raised, to secure an individual liability to the complainant, is not obnoxious to the objection that there is an adequate remedy at law; nor is it demurrable for multifariousness, although several purchasers from the defendant partners of different portions of the crop at different times are united with him as defendants. *Monroe v. Hamilton*, 47 Ala. 217.

A. files a bill to enforce a vendor's lien against B., since deceased, and former partner of C. and D., who, by cross-bill, set up a mechanic's lien for improvements made upon the land sold to B. by A., while B. was in possession, and a partner of C. and D., in building and contracting. *Held*, that C. and D. cannot, as surviving partners of the old firm, settle in their cross-bill their partnership dealings with B.'s estate; but they can, with proper averments, put in issue and try such dealings for the purpose of showing how much they are entitled to receive of the debt due them as builders and material-men. *Stammers v. McNaughten*, 57 Ala. 278. See *post*, 961, note.

See *Palmer v. Tyler*, 15 Minn. 106, as to when one partner will be entitled to an account notwithstanding he has failed to pay in the whole sum agreed by him to be contributed.

The plaintiff, after a dissolution of a partnership between himself and defendant, obtained a temporary injunction restraining the defendant from disposing of the firm assets, which was subsequently

modified by requiring both parties to file a bond to account for such assets to the register, and allowing either to dispose thereof, but at not less than cost. Plaintiff took possession of a large portion of the firm property without filing the bond, and sold it for less than cost without the authority of the defendant. *Held*, in an action for an accounting, and for an amount claimed to be due the plaintiff, that he was precluded by his unauthorized conduct from relief. *Kinney v. Robinson*, 33 N. West. Rep. (Mich.) 172; S. C. 9 West. Rep. 716.

<sup>1</sup> Where an action is brought for the dissolution of a partnership and an accounting, a court of equity having obtained jurisdiction of the cause may retain it for the purpose of doing complete justice between the partners, and to avoid a multiplicity of suits. *Shepherd v. Briggs*, 2 N. W. Rep. N. S. 370; S. C. 9 Neb. 257; *Epping v. Aiken*, 71 Ga. 682; *Gleason v. Van Aernam*, 9 Ore. 343; *Kayser v. Maugham*, 8 Colo. 232. See *post*.

A party cannot sue for an accounting under agreement of partnership which has never gone into effect. *Davis v. Key*, 31 U. S. (L. ed.) 112.

In a chancery suit by K. against A., B. & C. to enforce the lien of a judgment against them as partners on an accepted order known to the partners to include the amount due from the partnership to K., and also an individual debt from C. to K., *held*, that the court ought not, in such suit, to order a

**Persons entitled to an account.**—An account may be had by one partner<sup>1</sup> or by his executors or administra-

settlement of partnership accounts with a view of ascertaining the amount for which the lands of each partner should be primarily subject, and with a view to a proper decree among the co-defendants after such settlement. The lands of each partner in such case ought to be held primarily responsible for the portion of K.'s judgment which corresponds with his interest in the profits and losses of the partnership under the articles of copartnership. *Kent v. Chapman*, 18 W. Va. 485.

A partnership may become a member of a new partnership; and while the interest of the former in the latter may be a firm asset of the first partnership, this will not prevent one of its members from suing for a liquidation and settlement of the general partnership on appropriate allegations, and by making his fellow-members of both firms parties. In such a settlement, where the affairs of the general partnership are concluded, its debts paid, and the net profits for division ascertained and reduced to cash, and where it appears that the partner holding said fund has settled with the other members of the member firm for their interests, defendants have no right to oppose to plaintiff the necessity of liquidating the subordinate firm, but he will be decreed directly entitled to recover his shares. *Simonton v. McLain*, 37 La. Ann. 663.

As to the settlement of coal partnerships, where one partner is a partner in another coal firm, etc.,

see *Blackiston's Appeal*, 81\* Pa. St. 339.

<sup>1</sup> A bill for accounting and a receiver, on dissolution, will be sustained, notwithstanding the partnership is a limited one and the complainant the special partner. The latter has the same right as a general partner to insist that the assets be applied to pay the partnership debts; and 1 Revised Statutes, 766, section 18, expressly entitles him to an accounting. *Hogg v. Ellis*, 8 How. Pr. 473. See, also, *Latting v. Fassman*, 29 La. Ann. 280.

A party who is a silent partner in a firm, and whose interest was kept concealed in order that it might not be attached by his creditors, may maintain a bill in equity for an account and settlement against the other partners who participated in the concealment. *Harvey v. Varney*, 98 Mass. 118.

If either of the partners, being without fault, can show that his adversary has violated the terms of the partnership contract, and abused the trust with which, as a partner, he was clothed, and that he has partnership assets that he has not accounted for, that showing entitles such partner to an accounting. *Holladay v. Elliott*, 3 Oreg. 340.

Each partner is liable to account to every other for himself, and not for his copartner; and no two partners are responsible to another jointly. *Portsmouth v. Donaldson*, 32 Pa. St. 202.

Where a partnership is alleged in a bill and admitted by the an-

swer, an account, as a general rule, is of course, unless the party has slept upon his rights. *Glenn v. Hebb*, 12 Gill & J. 271.

Although it is the general rule, where a partnership is alleged and admitted, to order an account of the partnership affairs, as a matter of course, unless the right of the complainant to relief is barred by the lapse of time, such account should not be ordered where it manifestly appears from the proof that the party asking the interposition of the court has no real cause of complaint, and that no good purpose or end can be accomplished by directing an account to be taken. *McKaig v. Hebb*, 42 Ind. 227.

Where the plaintiff files his complaint, alleging a partnership, and asking for an accounting by the defendant, if he does not establish the existence of the partnership he will not be entitled to the accounting. *Salter v. Ham*, 31 N. Y. 321; *Arnold v. Angell*, 62 N. Y. 508. See, also, *Adams v. Gaubert*, 69 Ill. 585; *Moffatt v. Moffatt*, 10 Bosw. 468; *White v. White*, 4 Md. Ch. 418. Compare *Perkins v. Perkins*, 3 Gratt. 364.

Under a bill, however, for an account and dissolution against three alleged partners, the complainant can have the relief he is entitled to against the others, though the proof shows that one of the alleged partners defendant is not in fact a partner. *Bass v. Taylor*, 34 Miss. 342.

A., B. and C. formed a partnership, in which A. and B. were each interested one-fourth part and C. one-half. At the same time D., the father-in-law of C., gave a written guaranty to A. and B. that

C. should fulfill all contracts the partnership should make in their business to the extent of his interest in the partnership. The business was carried on, under the management of C., as active partner, for some years, when C. removed to Canada, and there died insolvent and intestate, before any dissolution of the partnership, leaving no property in this state except such interest as he might have in the partnership concerns. There being no settlement of the partnership accounts, either between the partners themselves or between the partnership and other persons, A. and B. brought their action at law against D. on the guaranty, and, during the pendency of the suit, sought the interposition of a court of chancery by a bill against D., stating these facts, and averring that, in order to have complete justice done in said action, it was desirable, if not necessary, to have the accounts of the partnership fully settled, and praying for an adjustment of such accounts, and that such sum as should be found due from C. to A. and B. should be paid by D. or be made the rule of damages in said action. On a demurrer to this bill it was *held* that such bill was not sustainable: 1. Because it did not appear from the facts stated that the plaintiffs could not have adequate redress in said action. 2. Because D. was neither party nor privy to the partnership accounts. 3. Because, if the settlement sought were made, it would not be conclusive upon D., nor equitable that it should be. 4. Because a court of equity will not extend the liabilities of a surety beyond their

legal limits. 5. Because no discovery was called for, no injunction sought, no mistake, accident, fraud or other ground of equitable relief alleged. *Bissell v. Ames*, 17 Conn. 121.

A complaint which sets forth a partnership between the plaintiff and defendant, a dissolution, the existence of unsettled accounts and a balance in favor of the plaintiff, and demands an accounting and judgment for the balance, shows a sufficient cause of action. *Ludington v. Taft*, 10 Barb. 447.

A petition in an action by one partner against another which alleges the partnership, gives a copy of the original contract therefor, alleges that the plaintiff, at the outset, paid in a certain specified amount; that the partnership was terminated, and that, during its existence, plaintiff had paid, on account of debts and expenses, a large sum, and that, upon a settlement of the partnership accounts, which the plaintiff had vainly sought, a large sum would be found due the plaintiff, and which shows that the partnership owned a large number of chattels, and involved a series of transactions, states a cause of action, and is good as against any objections that can be raised by demurrer, notwithstanding it does not in terms allege that defendant had possession of any of the partnership property, or that he had any accounts to render. *Carling v. Donegan*, 15 Kan. 495.

In a proceeding for a settlement of partnership accounts a bill which did not show the existence of the partnership and did not contain any statement of the account by the plaintiff nor ask for a state-

ment by the defendant was held defective. *Pope v. Salsman*, 35 Mo. 362.

A bill for a dissolution of partnership and an account cannot be sustained in that form if the evidence shows that the members have been incorporated. *Benninger v. Gall*, 1 Cincin. 331.

A bill in equity brought by a partner against his copartner for an account, etc., wherein it is averred that the defendant has all the partnership books and papers in his possession or under his control, and refuses to permit the plaintiff to examine them, need not contain such certainty and particularity of statement as would be held necessary if the plaintiff had access to those books and papers. *Towle v. Pierce*, 12 Metc. 329.

A complaint of one partner against another, asking for judgment of a particular sum, forming a part of the partnership profits, and not praying for an account of the partnership concerns, cannot be sustained. *Russell v. Byron*, 2 Cal. 86.

If, in a bill by one partner against a copartner, he prays that his copartner may be decreed to pay over to him one-half the net profits of the partnership, such prayer is equivalent to a prayer for an account. *Bennett v. Woolfolk*, 15 Ga. 213.

A bill in equity by a partner, for his balance in the copartnership account, failing to allege that there are no liabilities or that final settlement has been had, or, in case of dissolution, not asking for a marshaling of the assets or for a final settlement, is, generally speaking, insufficient, and bad on de-

murrer. *Williamson v. Haycock*, 11 Iowa, 40.

Where, by agreement of the parties, one of the partners, on a dissolution of the partnership, is to make the collection of debts due the concern, a bill afterwards filed by the other partner against him for his share of the moneys collected must allege when the collection was made or it will be bad on demurrer. *McCament v. Gray*, 6 Blackf. 233.

In a bill by a copartner to compel a settlement of the partnership accounts, the complainant, being administrator of a deceased copartner, may join with his own the claims of such deceased partner. *McLaughlin v. Simpson*, 3 Stew. & P. 85.

Where A. and B. entered into an agreement, by the terms of which B. was to buy a tract of land of C., on which was a mill-seat and mill, and they were to build the mill anew, A. was to do the work, and B. to furnish the material and money, and, out of the profits, they were to pay for the land and reimburse B. for his outlay and pay the plaintiff for his work, and afterwards they were to share the profits or losses equally, as partners, and, in pursuance of the agreement, the land was bought and the mill built and became profitable, and B. received the profits, reimbursed himself and paid for the land, *held*, that A. was entitled to an account as a partner, and that it was not necessary that the contract should be in writing. *Falkner v. Hunt*, 73 N. C. 571.

If partners agree upon terms of dissolution, whereby one agrees to take the assets and pay the other a

given sum and pay all the partnership debts, and the one so promising fails and refuses to perform his agreement to pay the other and the debts, that other, if subjected to loss by being compelled to pay debts, may repudiate the agreement and maintain a bill for an account according to his rights as they existed before the agreement. *Bailey v. Moore*, 25 Ill. 347.

A. and B. carried on a trade as partners, with the funds of A., in the name of B., who, without any dissolution of the copartnership, or rendering any account to A., afterwards, without the consent of A., entered into partnership with C. and carried into the new concern all the funds of the former partnership. A., on the death of B., filed a bill against his administrator and C., his surviving partner, for a discovery and account. *Held*, that A. was entitled to an account from C. of the transactions and profits of the partnership between him and B. and of the personal estate of the intestate in his hands. *Long v. Majestre*, 1 Johns. Ch. 305.

The agent of one partner, coming into possession of the effects, will be regarded as a trustee, and accountable in equity to the creditors of the firm and the other partners, though his principal has deceased and no administration has been granted. *Peterson v. Poignard*, 6 B. Mon. 570.

One who has subscribed to the articles of association of a land company, but has failed to pay in, on calls, the amount thereby required as a condition of membership, is not, as it seems, entitled to maintain a bill for account of

tors (r)<sup>1</sup> against his copartner or his executors or administrators. (s)<sup>2</sup> So by the trustees of a bankrupt partner<sup>3</sup> against profits and for partition of lands unsold. *Stevenson v. Mathers*, 67 Ill. 123.

Where two persons made an agreement to form a partnership, but such partnership was never launched, and one of the parties proceeded to conduct the enterprise in his own name, at his own cost and for his own exclusive benefit, excluding the other and repudiating the partnership agreement, the latter's remedy is not for an accounting, but an action at law for breach of contract. *Powell v. Maguire*, 43 Cal. 11.

A person having a contract on public works entered into an agreement with another to form a partnership in the business under such contract and in other contracts that they might obtain. They completed such contract and divided the profits. After which the first gave notice that he would continue the arrangement no longer, but would bid on his own account. A

subsequent contract was awarded to him, from which he excluded the other. *Held*, that there was no partnership in the business under the last contract, and a bill for an account, etc., would not lie; that the remedy of the other party was at law for a violation of the agreement. *Doyle v. Bailey*, 75 Ill. 418.

(r) *Heyne v. Middlemore*, 1 Rep. in Ch. 138; *Hackwell v. Eustman*, Cro. Jac. 410.

<sup>1</sup> To the point that the surviving partner, to whom the settlement of the copartnership affairs is left, can, upon the settlement of the copartnership accounts, be compelled to account for the surplus or portion due the estate of the deceased, see *Stewart v. Burkholter*, 28 Miss. 396; *Freeman v. Freeman*, 136 Mass. 260; S. C. 142 id. 98, and the cases hereinafter cited. See, also, *Roberts v. Kelsey*, 38 Mich. 602; *Sewell v. Humphrey*, 37 Vt. 265; *Scott v. Searles*, 13 Miss. 25.

A surviving partner cannot, how-

(s) *Beaumont v. Grover*, 1 Eq. Ab. 8, pl. 7.

<sup>2</sup> A bill for an account against the representatives of two successive partnerships, *held* to be multifarious. *Keith v. Keith*, 143 Mass. 262.

<sup>3</sup> A partner may maintain a bill in equity against his copartner and a third person to recover his proportion of moneys paid to the defendant by the United States in accordance with a decision of the court of commissioners of Alabama claims, under the United States statute of June 23, 1874, for property of the partnership destroyed

by an insurgent cruiser, although after the destruction of the property, and before the making of the treaty of Washington of 1871, the plaintiff was adjudged an insolvent debtor under the laws of this commonwealth, and all his property was duly assigned to his assignee, if all the debts proved against the plaintiff's estate in insolvency, or existing at the time of the assignment, have been paid, satisfied and discharged, and the assignee has signified his assent in writing to the maintenance of the bill in the name of the debtor. *Jones v. Dexter*, 125 Mass. 469.

the solvent partner (*t*) or his executors. (*u*) So a solvent partner may maintain an action for an account against the

ever, maintain an action against the personal representative of his deceased partner for an account of the partnership affairs. *McKay v. Joy*, 70 Cal. 581.

The surviving partner of a firm must account to the representatives of a deceased partner for the property of the firm as it was at the time of the deceased partner's death. The representatives are entitled to an accounting absolutely, and need not show that there would be something due to them from the firm on settlement. Their right to an account results from their interest in the effects of the firm and the liability of the estate to contribute to the payment of the firm debts. *Cheeseman v. Wiggins*, 1 Thomp. & C. 595. See, also, *Denver v. Roane*, 8 Reporter, 33; S. C. 99 U. S. 355.

A bill for an account against a surviving member of a firm to ascertain the value of the testator's interest may be maintained by his executor notwithstanding a decree of the orphans' court charging the executor personally with the value of his testator's interest in a firm of which both were members; and the valuation of the testator's interest will include profits on the share until its purchase, although the share was taken at an appraisal previously made. *De Haven's Appeal*, 5 Cent. R. 560; S. C. 6 Atl. R. 768.

A complaint, however, by the administrator of the estate of a

deceased partner against the surviving partner, to recover the value of assets of the partnership, which the defendant has refused to account for, misapplied, and converted to his own use, it is held, should contain proper traversable averments that the partnership debts have been paid; that the affairs of the partnership have been finally settled, and that the shares of the partners have been ascertained; and should show a demand made, or a proper excuse for not making a demand, before the bringing of the action. *Krutz v. Craig*, 53 Ind. 561.

If surviving partners unreasonably delay in closing the partnership affairs, or waste the property, the administrator of the deceased partner should, if the partnership creditors neglect so to do, file a bill calling the survivors to account, and praying for an adjustment of the partnership affairs. *Miller v. Jones*, 39 Ill. 54.

Where a surviving partner used the partnership funds, after a dissolution by the death of his former partner, in the business of a new partnership which he entered into with another, *held*, that an action would lie by the administrator of the deceased partner for an accounting against the survivor, or his representatives after his decease, and his last partner, and that the administrator could recover from the latter the amount found due from him to the first

(*t*) As in *Wilson v. Greenwood*, 1 Swanst. 471.

(*u*) As in *Addis v. Knight*, 2 Mer. 119.

trustees of his bankrupt copartner; and, notwithstanding the rule against making mere witnesses parties, the bankrupt

partnership. *Castly v. Towles*, 46 Ala. 660.

A surviving partner by misrepresentations and fraudulent dealing procured from the decedent's administratrix, who was also, as he knew, trustee for decedent's children, a conveyance of partnership interests belonging to decedent's estate for much less than their reasonable value. *Held*, that the use of the property thus wrongfully appropriated must be regarded as a continued use of partnership assets never accounted for, which the survivor might properly be decreed to make good to the administratrix on a bill brought by her for an accounting. *Heath v. Waters*, 40 Mich. 457.

A., B. and C., who were partners as attorneys and counselors-at-law, agreed that the general partnership between them should terminate March 18, 1869; that thereafter no new business should be received by the firm, and that any coming to it through the mails should be equitably divided. It was also stipulated that the business then in hand should be closed up as rapidly as possible by them "as partners under their original terms of association and in the firm name." They agreed, August 13, 1869, that, in case of the death of either of them, his heirs or personal representatives should receive one-third of the fees in cases nearly finished, and twenty-five per cent. in other partnership cases. A. having died, his executor filed his bill against B. and C. for a discovery, and to recover A.'s share in the fees re-

ceived by them out of the partnership business which remained unfinished when the firm was dissolved. *Held*, that a court of chancery had jurisdiction to entertain the bill and power to decree the relief asked so far as the fees had been collected. *Denver v. Roane*, 99 U. S. 355.

A. and B. were partners, A. carrying on the business of the firm in Boston, and B. in New Orleans. A. took in C. as a partner in the business carried on in Boston, and A. and B. agreed in writing that after a settlement with C. all the business in Boston should be settled by the articles of agreement between A. and B. Real estate was afterwards acquired by A. and C. in Massachusetts and other states with partnership funds, and was agreed to be treated as partnership property. A. died. *Held*, that the administratrix of his estate could not maintain a bill in equity to compel C. to sell said real estate as surviving partner, and to account to her directly for the proceeds; but that B., as surviving partner of the original firm, had a right to insist on C.'s accounting with him therefor. *Shearer v. Paine*, 12 Allen, 289.

The surviving partner of a commercial firm is not liable as liquidator to account to the succession of his deceased partner for any single item of indebtedness to the succession, but to pay over the entire sum found to be due on the succession on the settlement of the partnership. *Walmsley v. Mendelsohn*, 31 La. Ann. 152.



himself may, it is said, be made a defendant for the purposes of discovery. (v) Again, if a partner's share is taken in execution, the purchaser from the sheriff is entitled to an account from the solvent partners, as is also the execution debtor himself. (x)

Where a suit was brought by the heir of one of the members of a partnership against the heirs of the other member, claiming a certain sum, and giving, in his petition, a detailed statement of the property belonging to the partnership, and of its annual revenues, *held*, that if plaintiff had any right to the property described in his petition, and was, therefore, entitled to an account from the heirs of the surviving partner, his right, and the rendition of an account of the partnership affairs, could be determined in such a form of action as well as any other; and that such a suit was in the nature of an action for the settlement of partnership affairs, and a partition and a division of the partnership effects. *Atkinson v. Rogers*, 14 La. Ann. 633.

One who is next of kin, or a legatee or creditor, cannot file a bill against the surviving partner of a testator or intestate for the sole purpose of compelling him to account and settle the partnership accounts with the personal representative of the deceased partner. *Harrison v. Righter*, 11 N. J. Eq. 389.

In the absence of special circumstances authorizing the same, an heir at law and distributee of a deceased partner cannot maintain a bill against his administratrix and surviving partners for an account of the affairs of the firm. *Rosenzweig v. Thompson*, 66 Md. 593.

A bill in equity by the distrib-

utees of a decedent against his administrator and a former partner, to set aside the reports of commissioners on his estate and an account, will be sustained where it charges the collection by the former partner of partnership moneys after the date of the claim allowed by the commissioners and the neglect to collect other partnership moneys of which, on the refusal of the administrator, the distributees could compel an account. *Chapman v. Chapman*, 13 R. I. 680.

Upon the death of a partner one of the surviving partners was made administrator. *Held*, that next of kin could not file a bill against the surviving partners for an account, there being no charge of collusion between the administrator and the other partners. *Hyer v. Burdett*, 1 Edw. Ch. 325.

The widow of a deceased member of a partnership is entitled to a discovery and account from the surviving partner of all moneys belonging to her separate estate received by her husband as trustee for her under the code, and mingled by him with the partnership funds, and of all disbursements made by the partnership, and properly chargeable to her, and interest on the amount due her at the death of her husband. *Dent v. Slough*, 40 Ala. 518.

(v) *Whitworth v. Davis*, 1 V. & B. 545. See *Mitford*, Pl. 187, ed. 5.

(x) See *Habershon v. Blurton*, 1

**Servants, etc.**—An agreement to pay out of profits confers a right to an account; and servants entitled to a share of profits can maintain an action for an account of them. (*y*)<sup>1</sup>

**Sub-partners, etc.**—A sub-partner has no right to an account from the principal firm, or any of the members of it, except the one with whom he is a sub-partner; for there is no contract or privity save between those two. (*z*) It has even been said that if a partner charges or mortgages his share in favor of a creditor the latter has no right to an account from the other partners of the profits to which their copartner may be entitled. This, however, is not correct; (*a*) and, as regards partners in mines, it has been decided that a mortgagee of one partner is entitled to an account against the other partners. (*b*)<sup>2</sup> If a part-  
[\*494] ner, with the consent of his copartners, assigns his share in the partnership, the assignee will, by virtue

De G. & Sm. 121; *Perens v. Johnson*, 3 Sm. & G. 419.

(*y*) See *Harrington v. Churchward*, 6 Jur. N. S. 576; *Rishton v. Grissell*, 5 Eq. 326; *Turney v. Bayley*, 4 De G. J. & Sm. 332.

<sup>1</sup>One who is to receive a share of the profits of a business may maintain a bill in equity for an account thereof. *Bentley v. Harris*, 10 R. I. 434 (distinguishing *Hazard v. Hazard*, 1 Story, 371); *Hallett v. Cumston*, 110 Mass. 32, decided under Mass. Gen. Stat. ch. 113, § 2.

(*z*) *Brown v. De Tastet*, Jac. 284; *Raymond's Case*, cited in *Ex parte Barrow*, 2 Rose, 252; *Bray v. Fromont*, 6 Madd. 5. And see *Killock v. Greg*, 4 Russ. 285, as to agents.

(*a*) See *Whetham v. Davey*, 30 Ch. D. 574, and *ante*, p. 364.

(*b*) *Bentley v. Bates*, 4 Y. & C. Ex. 182.

<sup>2</sup>Where one partner assigns his

interest in the assets of an unsettled partnership to a third person, and draws an order upon his copartner, directing him to pay over to the assignee all moneys that may be due him on final settlement of the partnership affairs, the assignee is entitled to all the remedies for procuring a settlement which the drawer would have had against the drawee if there had been no assignment; and he may maintain a bill for account against the drawee without making the drawer a party. *Fontaine v. Urquhart*, 33 Ga. (Supp.) 184. See, also, *Matthewson v. Clarke*, 6 How. 122; *Strong v. Clawson*, 5 Gilm. 346; *Marx v. Goodnough*, 16 Pac. Rep. 918; *Still v. Focke*, 66 Tex. 715.

An assignee of an assignee of a copartner in a joint purchase and sale of lands may sustain a bill in equity against the other copartners

of this assent, acquire the rights of the assignor, and be, therefore, entitled to an account from the other partners. (c)

**Creditors, etc., of deceased partner.**— If a partner dies a question arises as to the right of his creditors and legatees to sue the other partners for an account of the share of the deceased. The creditors of the late firm can maintain an action against the executors of the deceased and the sur-

and the agent of the partnership to compel a discovery of the quantity purchased and sold, and for an account and distribution of the proceeds. *Pendleton v. Wambersie*, 4 Cranch, 73.

One partner assigned his interest in the concern as security for a debt, but continued to be treated as a partner by the other partner. *Held*, that the first-mentioned partner might file a bill against the other partner and the assignees of his own share for an account of the partnership. *Buford v. Neely*, 2 Dev. Eq. 481.

A. and W. being partners, A., with the consent of W., transferred his interest to D., and D. and W. agreed to collect assets and pay the debts of the old firm. Afterwards D. brought a suit against W. for a dissolution and an account. *Held*, that A. could not, upon petition, become a party to the proceedings for the purpose of securing his rights in the firm property. *Dayton v. Wilkes*, 5 Bosw. 655.

If a partner has transferred his interest in the partnership to a third person, such third person is a necessary party to a bill filed to settle the partnership concern. *White v. White*, 4 Md. Ch. 418.

Where one partner without cause excludes his copartner from an interest in a valuable contract taken

by the firm, and attempts to take in another party in his stead, they will be liable to the excluded partner for his share of the profits. *Pearce v. Ham*, 113 U. S. 585.

Where, in an action for an accounting between partners, it appears that an assignment for the benefit of creditors has been made by the firm, the title to all the firm assets by virtue of the assignment is vested in the assignee, who alone can sue for a recovery, and the action for an accounting cannot be maintained. *Kuehenundt v. Haar*, 46 N. Y. Super. Ct. 188; S. C. 58 How. Pr. 464.

A bill was filed by one partner to settle the affairs of the partnership, which bill was supported by affidavits. The defendant appeared, and after appearance the complainant moved to amend the bill by making the assignee a party for the purpose of setting aside an assignment made by the other partner, and for a temporary injunction against the assignee and for a receiver. *Held*, that the bill would not be multifarious as amended, and the amendments were allowed on the usual terms. *Hayes v. Heyer*, 4 Sandf. Ch. 485.

(c) See *Fawcett v. Whitehouse*, 1 R. & M. 132; *Redmayne v. Forster*, 2 Eq. 467.

living partners in order to obtain payment of their debt out of the assets of the deceased. (*d*) But the separate creditors, or the legatees or next of kin of a deceased partner stand in a very different position. In the absence of special circumstances they have no *locus standi* against the surviving partners, but only against the legal personal representative of the deceased partner; (*e*) and it is only when there is collusion between these persons, or when circumstances have occurred which preclude the representative from himself obtaining an account of the share of the deceased, that his separate creditors, legatees or next of kin may themselves bring an action for that purpose against the surviving partners. (*f*)<sup>1</sup>

**General or limited account.**—The account which a partner may seek to have taken may be either a general account of the dealings and transactions of the firm, with a view to a winding up of the partnership, or a more limited account directed to some particular transaction as to which a dispute has arisen.

**Account without a dissolution.**—It was formerly considered that no account between partners could be taken in equity save with a view to a dissolution, (*g*) and a bill pray-

(*d*) *Wilkinson v. Henderson*, 1 M. & K. 582. See book iv, ch. 3, § 3.

(*e*) *Davies v. Davies*, 2 Keen, 534; *Travis v. Milne*, 9 Ha. 141; *Langley v. The Earl of Oxford*, 2 Amb. 798, Blunt's ed.; *Seeley v. Boehm*, 2 Madd. 180.

(*f*) See the cases last cited. This subject will be again alluded to.

<sup>1</sup> A bill filed by a member of a partnership which has been dissolved, praying that a receiver be appointed to collect and receive the debts due and coming to the firm, that an account be taken of all the partnership dealings and transactions, and that the other copartners be compelled to pay the complain-

ant what should appear, upon the taking of the accounts, to be due him from them, is a bill for the complete administration of the partnership property, in which the creditors of the firm are interested; and a decree granting relief is for their benefit as well as for the benefit of the parties to the suit, and they have a right to insist upon its execution, though not made parties in the bill, and after such a decree is entered the suit cannot be dismissed without their consent. *Updike v. Doyle*, 7 R. I. 446.

(*g*) *Forman v. Homfray*, 2 V. & B. 329; *Knebell v. White*, 2 Y & C. Ex. 15; *ante*, p. 464 *et seq.*

ing an account but not a dissolution has been held bad on demurrer. (*h*) But this rule has been gradually relaxed; for it has been felt that more injustice frequently arose from the refusal of the court to do less than complete justice than could have arisen from interfering to no greater extent than was desired by the suitor aggrieved. (*i*) Accordingly, in *Prole v. Masterman*, (*k*) where the promoter of a company sought to make his copromoters contribute to a debt paid by him, but for which they were liable as well as he, it was held that a decree might be made without directing a general account of what was due from the plaintiff in respect of other matters. Again, in the case of a mutual insurance society, where the funds of the society are answerable for the payment of the moneys due upon their policies, an assured member is entitled to an account of what is due to him upon his policy, and to a decree for the payment of what is so due, without involving himself in any general account of the dealings and transactions of the society, or seeking for a dissolution thereof. (*l*)

**Cases in which an account will be decreed although no dissolution is prayed.**—The old rule, therefore, that a decree for an account between partners will not be made save with a view to the final determination of all questions and cross-claims between them, and to a dissolution of the partnership, must be regarded as considerably relaxed, although it is still applicable where there is no sufficient reason for departing from it.<sup>1</sup>

(*h*) *Loscombe v. Russell*, 4 Sim. 8. Beav. 429. See, too, *Robson v.*

(*i*) See *ante*, § 3 (1) of this chapter. *McCreight*, 25 Beav. 272.

(*k*) 21 Beav. 61. Compare *Munings v. Bury*, Tam. 147. The circumstances that an action for contribution would lie did not oust the jurisdiction of a court of equity, *Wright v. Hunter*, 5 Ves. 792.

(*l*) See *Bromley v. Williams*, 32 Beav. 177; *Hutchinson v. Wright*, 25 Beav. 444; *Taylor v. Dean*, 22

<sup>1</sup>See *Hudson v. Barrett*, 1 Pars. Sel. Cas. 414.

In a bill for an account, where both parties agree that the business is at an end, and that the subject-matter of the agreement is extinguished, and both seek an accounting, disputing only as to the principles on which it shall be taken,

There are three classes of cases in which actions for an account, without a dissolution, are more particularly common, and to which it is necessary specially to refer. These are:

1. Where one partner has sought to withhold from his copartner the profit arising from some secret transaction.

2. Where the partnership is for a term of years still unexpired, and one partner has sought to exclude or expel his copartner or to drive him to a dissolution.

3. Where the partnership has proved a failure, and the partners are too numerous to be made parties to the action, and a limited account will result in justice to them all.

**1. Account where one partner withholds what the firm is entitled to.**—Where one partner has obtained a [\*496] secret benefit, from \*which he seeks to exclude his copartners, but to which they are entitled, they can obtain their share of such benefit by an action for an account, and such action is sustainable although no dissolution is sought. The cases illustrating this doctrine have been already noticed at length, (*m*) and it will therefore be sufficient here to state that an account was directed, although the plaintiff did not seek to have the partnership dissolved or its affairs wound up, in

*Hichens v. Congreve*, 1 R. & M. 150.

*Fawcett v. Whitehouse*, 1 R. & M. 132, *ante*, p. 313.

*Beck v. Kantorowicz*, 3 K. & J. 230.

*The Society of Practical Knowledge v. Abbott*, 2 Beav. 559.

the court, in disposing of the cause after trial, may well disregard the want of an averment that the partnership has been dissolved, or of a prayer for a decree of dissolution, even if such an averment and prayer are technically necessary. *Fairchild v. Valentine*, 7 Robt. 564.

Where one partner filed his bill for a dissolution of the partnership, praying for an account, and showing that on a particular day the partnership would expire, *held*, that although the prayer for an ac-

count was premature, but became proper in a short time afterwards, no additional statement was necessary; the defendant also praying that the business of the firm might be closed; and as the business was conducted by one alone that it was his duty to keep an account; and that he might be examined on oath as to all the partnership transactions. *Funk v. Leachman*, 4 Dana, 24.

(*m*) *Ante*, p. 305 *et seq.*

In all the other cases of this class, except *Clegg v. Fishwick*, (n) in which a dissolution was prayed, the report is silent as to whether a general winding up was sought or not.

**The equity of the firm is against the delinquent partner only.**—With reference to cases of this description it may be observed that, where the benefit which the plaintiffs assert their right to share has not yet been obtained, but only agreed for by their copartners, the plaintiffs have no *locus standi* against the person with whom the agreement has been entered into by those partners, and cannot, therefore, restrain such person from performing that agreement. The proper course for the aggrieved partners to take is to proceed against their copartners, and claim from them the benefit of the agreement into which they have entered. (o)

**2. Account in cases of exclusion, etc.**—Where the partnership is for a term of years still unexpired, and one partner has sought to exclude or expel his copartner or to drive him to a dissolution. In cases of this description an account has been directed although no dissolution has been asked.

The general proposition that courts of equity would interfere under the circumstances now supposed was laid down by Sir John Leach in *Harrison v. Armitage*, (p) where, however, no \*account was directed, inasmuch [\*497] as the evidence did not establish a partnership. But in *Chapple v. Cadell*, (q) an account was directed at the suit of a minority where the majority had sold a partnership newspaper to a stranger, and some of the more active of the majority had then entered into a fresh agreement with the purchaser to carry on the paper in partnership with him.

(n) 1 Mac. & G. 294.

(o) See *Alder v. Fouracre*, 3 Swanst. 489, where an injunction was granted restraining the executors of a deceased partner, who had agreed for a renewal of a lease,

from disposing of the lease when granted except for the benefit of the partnership.

(p) 4 Madd. 143.

(q) Jac. 537.

**Defendant refusing to account.**— *Richards v. Davies* (*r*) went a step further. There a partnership had been entered into for a term of years which was still unexpired. The defendants would come to no account with the plaintiff respecting the partnership dealings and transactions, but, on the application of the plaintiff, a decree for an account of all past transactions was made. Sir John Leach, in pronouncing judgment, observed that the plaintiff had no relief at law for money due to him on a partnership account; that, if a court of equity refused him relief, he would be wholly without remedy; and, in answer to the objection that, if such a suit were entertained, the defendant might be vexed by a new bill whenever new profits accrued, (*s*) his honor asked: What right would the defendant have to complain of such new bill if he repeated the injustice of withholding what was due to the plaintiff?

**Defendant seeking to drive plaintiff to dissolve.**— *Fairthorne v. Weston* (*t*) is another authority in point. In that case two solicitors entered into partnership for a term of years, and before the term expired the defendant conducted himself in such a way as to prevent the possibility of the partnership business being carried on. The defendant's object was to compel the plaintiff to dissolve. The plaintiff, however, instead of dissolving, filed a bill for an account of the partnership dealings and transactions since the last settlement, and for a receiver. The defendant insisted that the plaintiff was entitled to no relief except with a view to dissolution; but the court held otherwise and observed that there was no universal rule to the effect that a bill asking for a particular account, but not for a dissolution, [\*498] was demurrable, and that, if \*there were any such rule, a person fraudulently inclined might, of his mere will and pleasure, compel his copartner to submit to

(*r*) 2 R. & M. 346.

in *Loscombe v. Russell*, 4 Sim. 8,

(*s*) This objection was made by Lord Eldon in *Forman v. Homfray*, 2 V. & B. 330; by V.-C. Shadwell in *White*, 2 Y. & C. Ex. 15.

(*t*) 3 Ha. 387.



the alternative of dissolving a partnership or ruin him by a continued violation of the partnership contract.

**Other cases.**— Again, where a person seeks to establish a partnership with another who denies the plaintiff's title to be considered a partner, if the former is successful upon the main point in dispute an account of the past dealings and transactions will be decreed, although the plaintiff does not seek for a dissolution of the partnership which he has proved to exist. (u) Upon the same principle it is apprehended that, if a partner is wrongfully expelled and he is restored to his *status* as partner by the judgment of the court, an account will be directed, but the partnership will not necessarily be dissolved. (x)

**Mines.**— As regards mines, it has also been decided that, if one co-owner excludes another from his share of the profits, an account will be directed although no dissolution is prayed. (y) But, as each co-owner of a mine can sell his share without the consent of the other owners, there is no occasion for him to ask for a dissolution, and the case of a mine is therefore, perhaps, not an apt illustration of the doctrine in question.

**3. Account where concern has failed.**— Where the partnership has proved a failure, and the partners are too numerous to be made parties to the action, and a limited account will result in justice to them all, such an account will be directed although a dissolution is not asked for. The leading case in support of this proposition is *Wallworth v. Holt*, (z) in which Lord Cottenham, in an elaborate and justly celebrated judgment, overruled a demurrer to a

(u) *Knowles v. Haughton*, 11 Ves. 168, as reported in Collyer on Partn. 198. note. The defendant, however, did not resist the account after the question of partnership was decided against him.

decreed. In the case of an incorporated company this point cannot arise. *Garden Gully Co. v. McLister*, 1 App. Ca. 39, is an instance.

(y) *Bentley v. Bates*, 4 Y. & C. Ex. 182. See, also, *Redmayne v.*

(x) See *Blisset v. Daniel*, 10 Ha. 493, where the bill prayed for a dissolution, but no dissolution was

*Forster*, 2 Eq. 467.

(z) 4 M. & Cr. 619.

bill by some of the shareholders of an insolvent joint-stock bank, on behalf of themselves and others, against the directors, trustees and public officer of the company, and [\*499] certain share\*holders who had not paid up their calls, praying that an account might be taken of all the partnership assets, and that the outstanding assets might be got in by a receiver, and that the whole might be converted into money and applied towards the satisfaction of the partnership debts. In delivering judgment the lord chancellor observed:

“When it is said that the court cannot give relief of this limited kind it is, I presume, meant that the bill ought to have prayed a dissolution and a final winding up of the affairs of the company. How far this court will interfere between partners, except in cases of dissolution, has been the subject of much difference of opinion, upon which it is not my purpose to say anything beyond what is necessary for the decision of this case; but there are strong authorities for holding that, to a bill praying a dissolution, all the partners must be parties; (a) and that bill alleges that they are so numerous as to make that impossible. The result, therefore, of these two rules would be — the one binding the court to withhold its jurisdiction, except upon bills praying a dissolution, and the other requiring that all the partners should be parties to a bill praying it — that the door of this court would be shut in all cases in which the partners or shareholders are too numerous to be made parties, which, in the present state of the transactions of mankind, would be an absolute denial of justice to a large portion of the subjects of the realm in some of the most important of their affairs. This result is quite sufficient to show that such cannot be the law.”

In *Wallworth v. Holt* the bill was filed for the sole purpose of having the assets of the company applied in payment of its joint debts; it did not pray an account of the partnership dealings and transactions for the purpose of obtaining a division of the profits (if any) amongst the persons entitled thereto. If it had, probably a decree would have been refused, either because a dissolution ought to have been asked, or because all the shareholders were not parties to the bill. (b)

(a) See, as to this, *ante*, p. 461. *v. Stanhope*, 14 Sim. 57, which

(b) See *Richardson v. Hastings*, were similar cases to *Wallworth v. 7 Beav. 323*, and 11 *id.* 17; *Deeks Holt*.

**Later cases.**—But since *Wallworth v. Holt* other cases have been decided in which bills praying for a division of the surplus assets amongst the shareholders, but not expressly praying for a dissolution, have been held good on demurrer. (c) The case which has gone furthest in this direction is *Sheppard v. Oxenford*; (d) for \*there [\*500] every kind of relief which would have been required in the event of a dissolution was prayed for, although a dissolution in terms was not asked for. In *Sheppard v. Oxenford* a number of persons formed an association for working mines in Brazil. The defendant was the sole trustee of the property, and the sole director. Disputes having arisen a bill was filed by a shareholder on behalf of himself and all the other shareholders against the defendant for an account of the moneys received and paid by him on behalf of the association, and for an account of its debts, and for their payment out of the available assets, and for a sale, if necessary for that purpose, of part of the property, and for a division of *profits*. The bill also prayed an injunction to restrain the defendant from selling or disposing of the property, and for a receiver to get in the debts due to the association, and to manage the affairs thereof until the accounts were taken, but no dissolution was asked. A demurrer to this bill was put in and overruled, (e) and an injunction was granted restraining the defendant from selling or disposing of the property otherwise than in the ordinary course of business; and a receiver and manager of the property in this country was appointed. It is to be observed that, although this was a case of a mine, the mine was in a foreign country, and was, strictly speaking, partnership property, and not merely so much land belonging jointly or in common to several co-owners.

(c) See *Apperly v. Page*, 1 Ph. 779; *Wilson v. Stanhope*, 2 Coll. 629; *Cooper v. Webb*, 15 Sim. 454, and *Clements v. Bowes*, 17 id. 167. (d) 1 K. & J. 491. (e) See 1 K. & J. 501.

**Result of latest cases.**—Having regard to the decisions in *Sheppard v. Oxenford*, and other modern cases of a similar kind, especially *Apperly v. Page* (f) and *Clements v. Bowes*, (g) it is conceived that the doctrine established in *Wallworth v. Holt* may be considered as extending not only to cases where an account is sought for the purpose of having joint assets applied in discharge of the joint liabilities, but also to cases where an account is sought for the additional purpose of obtaining a division of the surplus assets and *profits* amongst the persons entitled thereto. If this be so the last remnant of the doctrine that, in partnership cases, there can be no account without a dissolution, must be considered as swept away, at least as regards [\*501] partnerships \*the members of which are too numerous to be made parties to the action.

**Offer by plaintiff to pay what is due from him.**—A claim for an account need not contain an offer by the plaintiff to pay what, if anything, may be found due from him on taking such account. (h)

**Action for account of several partnerships.**—An action for an account of partnership dealings is not objectionable simply because it relates to the dealings of several partnerships, if they, in point of fact, are nothing more than continuations of one firm. (i)<sup>1</sup> But an action which involves

(f) 1 Ph. 779.

(g) 17 Sim. 167.

(h) *The Columbian Government v. Rothschild*, 1 Sim., 103.

(i) See *Jeffreys v. Smith*, 3 Russ. 158.

<sup>1</sup> When a partnership is dissolved by the death of a partner, and the survivors enter into a new partnership, and undertake to settle the affairs of the old partnership, in an action for dissolution of the new partnership the affairs of the old may be investigated. *Burchard v. Boyce*, 21 Ga. 6.

A complaint filed to compel a partnership account, if it contain sufficient to call upon the defendant for an accounting as to one branch of the partnership business, though insufficient as to the other branch of their business, will not be bad on a general demurrer to the whole complaint. *Young v. Pearson*, 1 Cal. 448.

On a bill brought by a partner against his copartners for account and settlement as to a branch of the business which had been discontinued, and in respect to which

the taking of an account of the dealings and transactions of two co-existing firms may be open to objection on the ground of practical inconvenience. (*k*)

**Alternative cases.**—Before the Judicature Acts a bill in equity against two persons praying for relief against one, and, in the event of the plaintiff not being entitled to relief against him, then for relief against the other, was demurrable. (*l*) But now, if the several defendants are so connected together as to render their respective liabilities doubtful, they can be all sued in one action, unless it is so embarrassing as to be incapable of being fairly and properly tried. (*m*)

**Motion before hearing.**—In an action for a partnership account, if the partnership is admitted, and there is in fact nothing in dispute between the parties except the accounts, an order directing them may be obtained before the trial of the action. (*n*)

**2. As to discovery and production of documents.**—The right of every partner to a discovery from his copartner of all matters relating to the partnership dealings and transactions is as incontestable as his right to an account; and such right, like the right to an account, devolves upon and is enforceable against a partner's legal personal representatives and trustees in bankruptcy.

the partnership had been dissolved, and also for a share of profits in a second branch of the business, not discontinued, but in active progress, and in respect to which the partnership still subsisted, the jury having found, in effect (and this finding being supported by the evidence), that the suit when commenced was groundless as to both branches of the business, a verdict in complainant's favor for a share of the profits which, pending the suit, accrued from the latter branch was held illegal; more especially as the bill did not seek, nor the verdict provide for, a dissolution of

the subsisting partnership, a final settlement of the accounts, a discontinuance of the business, or a disposition of the assets. *Wadley v. Jones*, 55 Ga. 529.

(*k*) See *Rheam v. Smith*, 2 Ph. 726.

(*l*) *Seddon v. Connell*, 10 Sim. 79.

(*m*) See Ord. xvi, rr. 4 and 7; xviii, r. 1; xix, r. 27. And compare *Honduras, etc. Co. v. Lefevre*, 2 Ex. D. 301, with *Evans v. Buck*, 4 Ch. D. 432; *Child v. Stenning*, 5 id. 695; *Bagot v. Easton*, 7 id. 1. See the observation of Lord Selborne in *Burstall v. Beyfus*, 26 Ch. D. 39.

(*n*) *Turquand v. Wilson*, 1 Ch. D.

85.

If a partner chooses to mix up partnership ac-  
[\*502] counts with \*his own private accounts he must pro-  
duce the whole, unless he can satisfactorily sever  
them. (o)

How far discovery can be required from an alleged part-  
ner who denies the partnership alleged will be examined  
hereafter; in the present place it will be sufficient to allude  
to a few points of practical importance arising where the  
right to discovery is not denied.

**Oppressive interrogatories.**—A party to an action for  
an account is often required to set forth, in answer to inter-  
rogatories, details which it is impossible for him to remem-  
ber, and to ascertain which inquiry and study are necessary;  
but all that he is bound to do is to furnish the interrogator  
with every means of information possessed or obtainable  
by himself, leaving the interrogator to make what he can  
of the materials thus furnished to him. The party interro-  
gated is not bound to digest accounts, nor to set out volu-  
minous accounts existing already in another shape, and  
which he offers to produce. Thus, in *Christian v. Tay-  
lor*, (p) in which the executor of one deceased partner  
filed a bill for an account against the executors of another  
deceased partner, and required them to set out in detail  
many complicated and voluminous accounts, it was held  
that they were not bound to do so; that they were under  
no obligation of going through the books for the purpose  
of giving the plaintiff the information which he asked;  
and that the defendants could not be compelled to do more  
than to refer to the books and documents in their possession  
in such a way as to entitle the plaintiff to have them pro-  
duced for his inspection. (q)

Where, however, there are specific questions, it is not

(o) See *Pickering v. Pickering*, 25 Madd. 176. A defendant is not en-  
titled to set out the accounts

(p) 11 Sim. 401.

(q) See, too, *Lockett v. Lockett*,  
4 Ch. 336; *White v. Barker*, 5 De G.  
& Sm. 746; *Seeley v. Boehm*, 2 Telford v. Ruskin, 1 Dr. & Sm. 148.

sufficient to refer generally to books and say that, save as therein appears, no answer can be given. The person answering must go a step further, and point out where in particular the information required by each interrogatory is to be found. (*r*)

**\*Person interrogated must make inquiries.**—A [\*503] person interrogated as to what he has done by himself or his agents (*s*) is bound to state what he knows, to make inquiries of his agents and servants, to obtain documents to the possession of which he has a right, and to afford his opponent either the information sought or all the means of obtaining information which the answerer himself possesses. (*t*) A person who has it in his power to obtain information cannot escape from discovery simply by saying he does not know; he must make reasonable efforts to inform himself. (*u*)

In case it becomes necessary for a person interrogated to remove obstacles thrown in his way, he should apply for further time to answer, and not put in an answer which is insufficient. (*x*)

(*r*) *Drake v. Symes*, Johns. 647. See, as to taking oppressive interrogatories off the file, S. C. 2 De G. F. & J. 81; and generally on this subject, Wigram on Discovery, 165-169; Bray on Discovery, book i, ch. 4, § 6.

(*s*) *Rasbotham v. Shropshire Union Rail. etc. Co.* 24 Ch. D. 110.

(*t*) As to what accountants' reports, etc., are privileged, see *Walsham v. Stainton*, 2 Hem. & M. 1; *Wilson v. Northampton & Banbury, etc. Rail. Co.* 14 Eq. 477. As to setting out a list of the debtors to the firm, see *Telford v. Ruskin*, 1 Dr. & Sm. 148, where it was held that such a list must be given. Compare the observation of V.-C.

Wood in *Drake v. Symes*, Johns. 651.

(*u*) See *Bolckow v. Fisher*, 10 Q. B. D. 161; *Taylor v. Rundell* (No. 1), 11 Sim. 391, and Cr. & Ph. 104; *Taylor v. Rundell* (No. 2), 1 Y. & C. C. C. 128, and 1 Ph. 222; *Stuart v. Lord Bute*, 11 Sim. 442, and 12 id. 460; *A.-G. v. Rees*, 12 Beav. 50; *Earl of Glengall v. Fraser*, 2 Ha. 99. And compare *Martineau v. Cox*, 2 Y. & C. Ex. 638, where it was held that a partner here in a firm carrying on business in a foreign country was not bound to set out a list of documents in the possession of the partners abroad.

(*x*) *Taylor v. Rundell* (No. 2), 1 Ph. 222; *Pickering v. Rigby*, 18 Ves. 484.

**Production of documents.**—In connection with this subject it may be useful to remind the reader of the rule that a person cannot be compelled to *produce*<sup>1</sup> books<sup>2</sup> which belong to himself and others who are not before the court. Thus, in *Murray v. Walter*, (y) the defendant in his answer

<sup>1</sup>Otherwise as to *discovery*. *Swanston v. Lishman*, 45 L. T. (N. S.) 362.

<sup>2</sup>In an action between partners for an accounting either is entitled at any stage of the action to an order requiring the production of all partnership books and the papers and accounts relating thereto, and their deposit with the clerk to be inspected and copied. *Stebbins v. Harmon*, 17 Hun, 445; *Kelly v. Eckford*, 5 Paige, 548.

In the settlement of an account between partners the parties have the same rights before the circuit court as before a master in regard to the production of books, examination upon interrogatories, etc. *Montanye v. Hatch*, 34 Ill. 394.

Where partnership accounts are referred to a commissioner for settlement the court will rule the parties to produce before him such books and papers as relate to the partnership, and direct him to disregard any matter therein which relates to the private affairs of the parties. *Calloway v. Tate*, 1 Hen. & Munf. 9.

A. and B., being partners in trade, mutually agreed that A. should devote his attention to one kind of business, and B. to another, and that all the profits and losses accruing from both kinds should be equally shared between them. *Held*, on a bill in chancery brought by A., after the death of B.,

against his administrators, for the account-books kept by B., that these facts alone evinced no title in A. to the partnership effects, and the bill was dismissed. *Canfield v. Hard*, 6 Conn. 180.

In an action by the executors of a partner who had conveyed all his interest in the firm to the other partner to set aside the releases and conveyances, it was held that the plaintiffs were not entitled to a general inspection of the books of the firm before judgment, they being the exclusive property of the defendant as long as the sale stood. *Platt v. Platt*, 61 Barb. 52; S. C. 11 Abb. Pr. N. S. 110.

Where the firm books are in the possession of the firm's assignee, a bill against the special partner for discovery is not the proper means of compelling the production of such books. *Milne's Appeal*, 17 Weekly Not. Cas. 559.

As a general rule the discovery of the books of a copartnership will not be permitted in an action against one copartner. *Martine v. Albro*, 26 Hun (N. Y.), 559; S. C. 63 How. 215.

Such discovery allowed, however, under the peculiar circumstances of this case. *Martine v. Albro*, 26 Hun (N. Y.), 559; S. C. 63 How. 215.

(y) Cr. & Ph. 114. The interest of the absent parties must be stated. *Bovill v. Cowan*, 5 Ch. 495.



stated that certain books relating to a concern in which the plaintiff claimed to be a partner with the defendant were in the possession of the treasurer of the concern on behalf of the several shareholders in it, many of whom were not parties to the suit; and it was held that the defendant could not be compelled to produce the \*books in question, although it was insisted, on [\*504] the authority of *Walburn v. Ingilby*, (z) that the plaintiff had a right to have whatever access to the books the defendant himself was entitled to. There are several other decisions to the same effect as *Murray v. Walter*; (a) but the doctrine there laid down does not apply to cases in which the absent parties interested in the books are in fact represented by the defendants on the record, and have no interest in conflict with theirs; (b) nor, it is said, to an action by a *cestui que trust* against a trustee who is charged with trading with trust moneys in partnership with other persons not before the court. (c)

**Agreement precluding inspection.**—If the plaintiff has agreed to accept the defendant's statement of profits, and not to investigate his books and accounts, the defendant will not be compelled to produce them before the hearing of the action. (d)

**Inspecting documents.**—A person who obtains an order for the production of documents is entitled, not only to inspect them himself, but to have them inspected by his solicitors and agents; (e) but not by an agent to whom his opponents reasonably object. (f) But neither he nor they

(z) 1 M. & K. 79.

(a) *Hadley v. M'Dougall*, 7 Ch. 312; *Reid v. Langlois*, 1 Mac. & G. 627; *Burbidge v. Robinson*, 2 Mac. & G. 244; *Penney v. Goode*, 1 Drew. 474; *Stuart v. Lord Bute*, 11 Sim. 453. Compare *Vyse v. Foster*, 13 Eq. 602.

(b) *Glyn v. Caulfeild*, 3 Mac. & G. 463.

(c) See *Vyse v. Foster*, 13 Eq. 602, which, however, turned on the sufficiency of an affidavit of documents. See *Freeman v. Fairlie*, 3 Mer. 43.

(d) *Turney v. Bayley*, 4 De G. J. & S. 332.

(e) *Williams v. Prince of Wales' Life, etc. Co.* 23 Beav. 338.

(f) *Dadswell v. Jacobs*, 34 Ch. D.

are entitled to make public the information they obtain by means of such inspection. The order is made with a view to the administration of justice between the litigant parties; and an injunction will, if necessary, be granted to restrain the communication to strangers of what may be ascertained in the course of an examination of the books and documents produced under the order. (*g*)

**Inspection by accountants.**—The common order does not entitle the person in whose favor it is made to inspect by a professed accountant specially \*appointed for the purpose; but if there is any necessity for so doing, a special order for inspection by such a person will be made. (*h*)

**Books in constant use.**—Books in use for daily business are ordered to be produced at the place where they are usually kept, and they will not be ordered to be deposited in court unless there is some special reason for so doing. (*i*)

**Payment of partnership moneys into court.**—If, in an action by one partner against another for an account, the defendant admits that he has in his hands money belonging to the firm, or that he had such money, and if he admits, or if it otherwise plainly appears, (*k*) that he ought to have it still, he can be compelled to pay such money into court before the hearing of the action. (*l*) As a general rule, however, a partner having partnership moneys in his hands cannot be made to pay those moneys into court before trial if he insists that on taking the accounts a balance will be found due to him. (*m*) Nor will he be compelled so to do unless the other partners will pay in what they may

278. See, also, *Draper v. Manchester & Sheffield Rail. Co.* 7 Jur. N. S. 86.

(*g*) *Williams v. Prince of Wales' Life, etc. Co.* 23 Beav. 338.

(*h*) *Bonnardet v. Taylor*, 1 J. & H. 383.

(*i*) *Mertens v. Haigh, Johns.* 735.

(*k*) An admission of liability to

pay is not necessary. See *Wanklyn v. Wilson*, 35 Ch. D. 180; *Dunn v. Campbell*, 27 Ch. D. 254, note.

(*l*) In *White v. Barton*, 18 Beav. 192, an admission by one partner that he and his copartner, who was not a party, had money in their hands was held sufficient.

(*m*) *Richardson v. The Bank of*

have in their hands. (*n*) Nor will a partner be ordered before trial to pay into court the amount of a debt due from him to the firm, if the amount to which he is indebted is not admitted and cannot be readily ascertained. (*o*) But if a partner admits that he has partnership moneys in his hands, and it appears from his own statements that they came there improperly (*p*) or in violation of good faith, he will be \*compelled to pay them into [\*506] court; (*q*) so if he admits facts from which it appears that he is indebted to the firm in a certain sum, and he does not insist that on the whole the firm is indebted to him, the money admitted by him to be due will be ordered into court. (*r*)

After trial the court will order a partner to pay into court a sum which is plainly due from him, although no certificate to that effect may have been made. (*s*)

If the partnership debts are unpaid and the defendant is liable to be sued for them, the order directing payment into court should reserve to him liberty to apply for pay-

England, 4 M. & Cr. 165. But in *Birley v. Kennedy*, 6 N. R. 395, a partner who admitted that he had drawn out more than he ought was ordered to pay the excess into court.

(*n*) *Foster v. Donald*, 1 J. & W. 252.

(*o*) See *Mills v. Hanson*, 8 Ves. 68; *Wanklyn v. Wilson*, *ante*, note (*k*).

(*p*) See *Costeker v. Horrox*, 3 Y. & C. Ex. 530, where a surviving partner, being also the executor of his deceased copartner, was ordered to pay into court 7,000*l.*, the amount of assets of the deceased improperly applied to partnership purposes. See the next note.

(*q*) *Jervis v. White*, 6 Ves. 738; *Foster v. Donald*, 1 J. & W. 252. In the first of these cases the mo-

tion was made before answer. In *Hichens v. Congreve*, 1 R. & M. 150, note, and *Gaskell v. Chambers*, 26 Beav. 360, directors obtaining secret benefits for themselves were ordered to pay the moneys received by them into court. Compare *Hagell v. Currie*, 2 Ch. 449, where the liability of the defendants did not sufficiently appear.

(*r*) *Toulmin v. Copland*, 3 Y. & C. Ex. 643; *Costeker v. Horrox*, 3 Y. & C. Ex. 530. In *Domville v. Solly*, 2 Russ. 372, an order was made though the defendants insisted that the plaintiff was entitled to nothing.

(*s*) *London Syndicate v. Lord*, 8 Ch. D. 84; *Creak v. Capell*, 6 Madd. 114.

ment out of court of the amount of the debts he may be compelled or pressed to pay. (t)

(b) *Of the defenses to an action for an account and discovery between partners and persons claiming under them.*

The defense on the ground of illegality, of fraud, of laches on the part of the plaintiff, and of want of proper parties to the action, have already been examined. (u) In addition, however, to these grounds of defense, there are others which require notice,<sup>1</sup> and which cannot be more

(t) *Toulmin v. Copland*, 3 Y. & C. Ex. 643. In S. C. (6 Price, 405) it was held that a surviving partner was not entitled to have partnership funds, on which the plaintiffs had put a *distringas*, transferred to him to enable him to pay outstanding debts.

(u) See, as to illegality, *ante*, p. 102 *et seq.*; as to fraud, *ante*, p. 479 *et seq.*; as to laches, *ante*, p. 466 *et seq.*; as to parties, *ante*, p. 459 *et seq.*

<sup>1</sup> A cross-bill is not necessary in a suit between partners, wherein the complainant seeks a dissolution and an account from the defendant, to enable the latter to get an account from the former, or to obtain relief against fraudulent practices of the complainant in giving the note of the firm without consideration, for his own benefit, and in buying up the paper of the concern at a discount, for his advantage, with a view to obtaining the full amount thereof out of the assets of the firm. Such a bill will not be sustained on demurrer. *Johnson v. Butler*, 31 N. J. Eq. 35; *Craig v. Chandler*, 6 Colo. 543. See *ante*.

In a suit for the settlement of partnership accounts the parties

defendant are entitled to an investigation of all transactions claimed as partnership matters, although they be not set forth in the pleadings by way of counter-claim. *Boyd v. Foot*, 5 Bosw. 110.

It is no defense to a bill for an account and settlement of a partnership that the defendant has been injured by the failure of complainant to perform his stipulations contained in the articles of partnership. The remedy of the defendant is at law on the agreement. *Boyd v. Mynatt*, 4 Ala. 70.

Where one partner sues the other for a liquidation and balance due on partnership account, the defendant cannot set up in reconvention damages to the business of the partnership caused by the bad habits of the plaintiff. *Mills v. Fellows*, 30 La. Ann. 824.

In an action to recover the balance of a partnership account the accounts current rendered by each of the partners to the others are admissible in evidence to show, by the admissions of the parties, that the items of such accounts are not items of partnership account. *Barry v. Barry*, 3 Cranch, C. Ct. 120.

A. assigned all his interest in the

conveniently alluded to than in the present place and under the following heads:

- \*1. Denial of partnership. [507]
- [1*a*. Statute of frauds.]
- 2. Statute of limitations.
- 3. Account stated.
- 4. Award.
- 5. Payment, and accord and satisfaction.
- 6. Release.

### 1. Denial by defendant of the alleged partnership.—

An action by one partner against another for an account of the dealings and transactions of an alleged partnership may be met by a denial of the existence of any such partnership. (*x*)<sup>1</sup> This defense, if relied upon as a reason for not

partnership effects to his copartner, B., who was to settle up the business, take a reasonable pay for his trouble in so doing, and divide any balance then remaining between them. *Held*, that, in a suit by A. against B., B. should be allowed to show the value of his services in settling up the business. *Pierce v. Cubberly*, 19 Ind. 157.

(*x*) *Drew v. Drew*, 2 V. & B. 159. *Hare v. London & North-Western Rail. Co.*, John. 722, is an instance in which a bill was successfully met by a plea denying that the plaintiff was a shareholder in the company.

<sup>1</sup> In a suit for an account of an alleged partnership, a plea denying the partnership must be supported by an answer and discovery as to every circumstance charged in the bill as evidence of the partnership, or the plea will be bad. *Everitt v. Watts*, 10 Paige, 82; S. C. 3 Edw. 486.

In a suit for an account of an alleged partnership, it was referred

to a master by consent to state the accounts without prejudice. *Held*, that the existence of the partnership could not be questioned by an exception to the master's report finding a partnership, though that question was not expressly referred to him, and that the proper method of contesting the question would have been to bring the cause on for hearing. *Jones v. Jones*, 1 Ired. Eq. 332.

Where a bill set out a partnership, giving its duration and kind, and the answer denied generally, and then admitted, a partnership of the kind described in the petition, but alleged a different time and duration, claiming that it was dissolved, *held*, that there was no issue as to the existence of the partnership, and that an accounting might be taken by a special referee. *Lannan v. Clavin*, 3 Kan. 17.

To a bill in equity for an account of sales of a book alleged to have been published by the defendant on the joint account of the plaintiff

answering interrogatories or making a discovery of documents, must be accompanied by statements on oath denying those allegations which, if true, would establish the partnership, and denying the possession of documents relevant to the question of partnership or no partnership. (*y*) In *Mansell v. Feeney*, (*z*) it was held that the plaintiff was entitled to an inspection of all documents admitted by the defendant to be in his possession, and to be relevant to the matters in question in the suit, although the defendant denied the partnership alleged by the bill, and also denied that the documents in question tended to prove its existence. The defendant, however, was allowed to seal up those parts of the books which he swore had no relation to the matters in question.

Before the Judicature Acts it was a rule in equity that except in one or two cases a defendant could not by answer (as distinguished from a plea) protect himself from giving discovery; if he answered at all he had to answer fully. (*a*) This rule, which no longer exists, (*b*) was often productive of great hardship; but, in conformity with it, a person sued for a partnership account was not allowed by answer to deny the alleged partnership, and excuse himself on that ground from setting forth accounts or producing [\*508] documents which the \*plaintiff required to see. (*c*)

and himself, an answer which denies that any such book was published during the time alleged, and asserts that the book published by the defendant was a different one, need not render an account of sales. *Armstrong v. Crocker*, 10 Gray, 269.

The plea of infancy by one partner is no bar to a bill for the dissolution of the partnership, the granting of an injunction and the appointing of a receiver to wind up the affairs of the firm. *Bush v. Linthicum*, 59 Md. 344.

It is not competent, however, in

such case, for the court by decree to impose any personal liability on the infant defendant for the debts of the firm. *Bush v. Linthicum*, 59 Md. 344.

(*y*) *Mansell v. Feeney*, 2 J. & H. 313; *Harris v. Harris*, 3 Ha. 450; *Sanders v. King*, 6 Madd. 61.

(*z*) 2 J. & H. 320. See, also, *Saull v. Browne*, 9 Ch. 364.

(*a*) See *Elmer v. Creasy*, 9 Ch. 69.

(*b*) Ord. xxxi, r. 6.

(*c*) *Hall v. Noyes*, 3 Bro. C. C. 483; — *v. Harrison*, 4 Madd. 252; *Shaw v. Ching*, 11 Ves. 303; *Somerville v. Mackay*, 16 Ves. 382;

However, notwithstanding this rule, the court in more than one instance declined to enforce it, and ordered applications for discovery in such cases to be postponed until after the necessity for making them appeared; (*d*) and as now a court, or judge at chambers, can order any question in dispute to be tried before any other, (*e*) a person denying an alleged partnership can easily be protected against a vexatious or oppressive exercise of a right to discovery. Whilst on the one hand he must give all such discovery as bears upon the question of partnership or no partnership, he will not be compelled to set out accounts or produce documents which he swears throw no light on that question, and can only be material after it has been decided in favor of the plaintiff. (*f*)

[1a. Statute of frauds.]<sup>1</sup>

**2. Statute of limitations.**—The statute of limitations (21 Jac. 1, ch. 16, § 3) enacts that all actions of account (other than for such accounts as concern the trade of merchandise between merchant and merchant, their factors and servants) (*g*) shall be commenced and sued within six years next after the cause of such action or suit. Before the Judicature Acts a court of equity was as much bound by this statute as a court of law; (*h*)<sup>2</sup> and advantage could

The Great Luxembourg Rail. Co. *v.* Magnay, 23 Beav. 646; Reade *v.* Woodrooffe, 24 id. 421; Bleckley *v.* Rymer, 4 Drew. 248; Mansell *v.* Feeney, 2 J. & H. 313; Thompson *v.* Dunn, 5 Ch. 573; Saull *v.* Browne, 9 Ch. 364.

(*d*) Clegg *v.* Edmondson, 8 De G. M. & G. 787; De La Rue *v.* Dickinson, 3 K. & J. 388; Lockett *v.* Lockett, 4 Ch. 336; Great Western Coll. Co. *v.* Tucker, 9 Ch. 376; Carver *v.* Pinto Liette, 7 Ch. 90; Wier *v.* Tucker, 14 Eq. 25.

(*e*) Ord. xxxvi, r. 8.

(*f*) See *Re Leigh's Estate*, 6 Ch. D. 256; Parker *v.* Wells, 18 id. 477; Whyte *v.* Ahrens, 26 id. 717.

<sup>1</sup> Where a partnership has been acted upon for a number of years under a verbal agreement, and one partner has received moneys for which he ought to account, the statute of frauds will be no bar to a bill for an account. *Gates v. Fraser*, 6 Bradw. 229.

(*g*) See, as to this exception, *Robinson v. Alexander*, 8 Bli. N. S. 352, and 2 Cl. & Fin. 717, and the cases there referred to.

(*h*) *Knox v. Gye*, L. R. 5 H. L. 656; *Foley v. Hill*, 1 Ph. 399; *Hovenden v. Annesley*, 2 Sch. & Lef. 607. And see *Whitley v. Lowe*, 25 Beav. 421, and 2 De G. & J. 704.

<sup>2</sup> See *McKeown v. Guild*, 12 Chi-

[\*509] be taken of it by plea, (*i*) or \*by answer, (*k*) or by demurrer if the facts sufficiently appeared on the face of the bill. (*l*)

cago Leg. News, 18; *Stout v. Seabrook*, 30 N. J. Eq. 187; *McClung v. Copehart*, 24 Minn. 17; *McKelvey's Appeal*, 72 Pa. St. 409; *Cotton v. Mitchell*, 3 Ont. 421; *Morgan v. Morgan*, 68 Ala. 80; *Arnett v. Finney*, 41 N. J. Eq. 147; *Hewett v. Lewis*, 4 Mackay (D. C.), 10; *Brewer v. Browne*, 68 Ala. 210; *Blake v. Sneeding*, 121 Ill. 67; *Wells v. Brown*, 3 So. Rep. (S. C.) 439.

See, also, *Bonney v. Stoughton*, 18 Bradw. 562; *Pierce v. McClellan*, 93 Ill. 245; *Still v. Holbrook*, 23 Hun, 517; *Bolton v. Dickens*, 4 Lea, 569; *Near v. Lowe*, 49 Mich. 482; *Bell v. Hudson*, 14 Pac. Rep. (Cal.) 791.

Though lapse of time is allowed to prevail sometimes in equity, it is (in those cases where the statute does not expressly or impliedly include courts of equity in its terms) only in analogy to the plea of the statute of limitations at law; and it cannot be allowed in favor of one partner in possession of real estate purchased with partnership funds against the other, for the possession of one is the possession of both. *M'Guire v. Ramsey*, 9 Ark. 518. See, also, *Hall v. Clagett*,

48 Ind. 225. See *ante*, Laches, p. 902.

A bill will not be entertained to establish a partnership between two persons, settle its dealings, and declare one of them a trustee for the benefit of the other as to purchases of real estate, when more than twenty years have elapsed since the accrual of the right before suit brought, during all of which period the defendant denied and disregarded the rights of the other alleged partner; and the fact that the partners were brothers, complainant being adverse to litigation, and on that account failing to sue in time, will not alter the case. *Phillipi v. Phillipi*, 61 Ala. 41.

No right of action for an account accrues to a retiring partner that can be "effectually prosecuted" until liquidating partners having possession of the assets have settled the debts of the partnership. The statute of six years in such case does not run against the retiring partner. *Miller v. Harris*, 9 Bax. (Tenn.) 101.

It does not follow from the fact of the dissolution of a partnership that either partner can, at that time, immediately maintain an ac-

(*i*) See *Bridges v. Mitchell*, Bunb. 217; *Whitley v. Lowe*, 25 Beav. 421, and 2 De G. & J. 704; *Welford v. Liddel*, 2 Ves. Sr. 400; *Beames' Pleas in Eq.* 161. In *Robinson v. Field*, 5 Sim. 14, and *Jones v. Pengree*, 6 Ves. 580, the plea was overruled as covering too much.

(*k*) As in *Martin v. Heathcote*, 2 Eden, 169; *Barber v. Barber*, 18 Ves. 286; *Tatam v. Williams*, 3 Ha. 347.

(*l*) *Foster v. Hodgson*, 19 Ves. 180; *Hoare v. Peck*, 6 Sim. 51; *Prance v. Simpson*, Kay, 678. See, also, since, *Noyes v. Crawley*, 10 Ch. D. 31.



The exception as to merchants' accounts was repealed by 19 and 20 Victoria, chapter 97, section 9. Whilst that excep-

tion for the settlement of its affairs. Where the business of the firm requires for its completion the continuance and completion of certain transactions, and no default or misconduct can be alleged on the part of either of the parties as a ground of action, the law will permit a reasonable time to be taken for the winding up of the partnership affairs before a right of action will accrue. The time fixed by the statute of limitations within which an action for the settlement of the affairs of the partnership must be brought does not commence to run immediately upon dissolution, and not until the right to bring and maintain an action for the redress sought exists. *Gray v. Green*, 41 Hun (N. Y.), 524.

Delay in a partnership settlement between a survivor and representative of a deceased partner cannot properly be charged against either party where their mutual negotiations are constantly progressing and fail without manifest want of good faith on either side. *Chittenden v. Witbeck*, 50 Mich. 401.

Where a former partner and brother, having been a book-keeper of the firm, had been in constant correspondence with his brother since the dissolution, had received from him from time to time a settlement of the accounts between them, had been perfectly satisfied with this settlement, and knew that the balance was against him, upon bill filed to open the accounts; more than twenty years having elapsed since the dissolution of the firm, and nearly that period before

filing the bill, *held*, that the lapse of time would be almost conclusive evidence of satisfactory adjustment between the parties. *Farrar v. Shepherd*, 60 Tenn. 190.

To render the lapse of the statutory period a bar to an action for an account by one partner against another, it must appear that the account has been closed for six years. *Stout v. Seabrook*, 30 N. J. Eq. 187.

Where the accounts between partners have been closed for six years, and there has been acquiescence for that period without fraud, the statute constitutes a bar; but the statute affords no defense in a case where there have been dealings within six years. *Todd v. Rafferty*, 30 N. J. Eq. 254.

The statute does not begin to run against each item of an account between partners from the time it becomes a part of the account, but if part be within six years it draws that which is before after it. *Todd v. Rafferty*, *supra*.

When, after dissolution, the partners continue closing up the business, receiving and paying out money, the cause of action is deemed to have accrued at the date of the last item received or paid out. No demand is necessary before suit brought. *McClung v. Copehart*, 24 Minn. 17.

The statute of limitations does not begin to run against an action for an accounting by one partner against another until the partnership has been dissolved or until a demand for an accounting and settlement has been made. *Richards*

tion was in force the statute of James was held not to apply to suits for an account between partners; (*m*) although even then, where a partner died, and seventeen years afterwards a bill for an account was filed against his executors by the surviving partners, the bill was dismissed, with costs. (*n*)<sup>1</sup>

*v. Grinnell*, 63 Ia. 44; S. C. 50 Am. Rep. 727. See, also, *Askew v. Springer*, 111 Ill. 662.

After the dissolution of a partnership the statute does not begin to run in favor of one partner against another until the partnership affairs as to debtors and creditors of the firm have been settled, or at least till a sufficient time has elapsed since the dissolution to raise the presumption that such was the fact. *Prentice v. Elliott*, 72 Ga. 154. See, also, *Jordan v. Miller*, 75 Va. 442.

In order to bar suit by one partner against his copartner, it must not only appear that the partnership was dissolved more than five years prior to the suit, but that there were no valid claims of debit or credit against or in favor of the firm paid, received or outstanding, within that time. *Sandy v. Randall*, 20 W. Va. 244.

After an account is settled between partners and a balance ascertained the statute of limitations begins to run. *Holloway v. Turner*, 61 Md. 217. See *Near v. Lowe*, 49 Mich. 482.

The statute begins to run against an action by one partner against his copartner for a settlement from the time there was an account stated of the business between the partners, made several years after dissolution of a firm, which they understood adjusted all the firm business, notwithstanding it may

have been subsequently discovered that there were a few inconsiderable debts due from the firm unprovided for, which were forgotten or omitted by inadvertence, and notwithstanding there were a large number of debts due the firm, but which were proportioned between the partners according to their respective interests. *Boggs v. Johnson*, 26 W. Va. 821.

Sale by administrator, after appointment but before qualification, of his intestate's interest allowed to stand for three years, *held*, to bar an account. *Demarest v. Rutan*, 40 N. J. Eq. 356.

The statute of limitations does not begin to run upon a decree for the balance, if any, against certain partners upon an accounting until such balance has been ascertained. *White v. Conway*, 66 Cal. 383.

Where, in a suit in equity for the settlement of an insolvent partnership, the contest is wholly between the creditors, one creditor will not be permitted to avail himself of the bar of the statute of limitations against the claims of the other creditors. *Conrad v. Buck*, 21 W. Va. 396.

(*m*) *Martin v. Heathcote*, 2 Eden, 169; *Barber v. Barber*, 18 Ves. 286, and some other older cases to the contrary, were overruled by *Robinson v. Alexander*, 2 Cl. & Fin. 717.

(*n*) *Tatam v. Williams*, 3 Ha. 347.

<sup>1</sup>See *Ray v. Bogart*, 2 John. C. 432. Where one partner dies, how-

**Merchants' accounts.**—The authorities which have been already referred to also show that before the act 19 and 20 Victoria, chapter 97, section 9, the statute of limitations did not apply to open, unsettled accounts, extending from a time more than six years before a bill was filed down to a time within such six years. Notwithstanding the words of the statute of James, "All actions of account . . . shall be commenced and sued," etc., it was held that, even as between persons who were not within the exception as to merchants' accounts, the statute did not begin to run so long as the account was continued; (*o*) and that the statute did not, in any case, apply to an unsettled, open, mutual account, with items on both sides representing cross-demands. (*p*)

**Application of statute to current accounts.**—The law in this respect was modified by Lord Tenterden's Act, (*q*) the effect of which is that, although there may be a mutual, open, running account, the mere existence of items not barred is not sufficient, in actions of debt or *assumpsit*, to take earlier items out of the statute of limitations. (*r*) Lord Tenterden's Act, however, did not apply to merchants' accounts as to which there was no statutory bar; nor did Lord Tenterden's Act apply to the mode of taking \*such accounts in a suit in chancery. But now, by 19 [\*510] and 20 Victoria, chapter 97, section 9, merchants' accounts are placed on the same footing as other accounts; and partnership accounts, whether they are or are not merchants' accounts, are within the statute of limitations; and those statutes are a bar to an action for an account extend-

ever, neither the statute of limitations nor the equitable bar commences running in favor of the surviving partner until administration has been taken out on the estate of the deceased partner. *Spann v. Fox*, 1 Ga. Dec. 1.

(*o*) See *per* Lord Eldon in *Foster v. Hodgson*, 19 Ves. 185; *Scudmore v. White*, 1 Vern. 456.

(*p*) See the notes to *Webber v.*

*Tivill*, 2 Wms. Saund. 124 *et seq.*, and *Catling v. Skoulding*, 6 T. R. 189.

(*q*) 9 Geo. 4, ch. 14.

(*r*) *Williams v. Griffiths*, 2 Cr. M. & R. 45; *Cottam v. Partridge*, 4 Man. & Gr. 271; *Ashby v. James*, 11 M. & W. 542; *Clark v. Alexander*, 8 Scott, N. R. 147; *Inglis v. Haigh*, 8 M. & W. 780. See, too, *Jackson v. Ogg*, Johns. 397.

ing to a period more remote than six years before the commencement of the action, unless there has been a breach of an express trust, or fraud, or payment, or an acknowledgment, such as required by Lord Tenterden's Act, or unless the partnership articles are under seal. So long, indeed, as a partnership is subsisting, and each partner is exercising his rights and enjoying his own property, the statute of limitations has, it is conceived, no application at all; but as soon as a partnership is dissolved, or there is any exclusion of one partner by the others, the case is very different, and the statute begins to run. (*s*) This has been decided by the house of lords in *Knox v. Gye*, (*t*) in which a surviving partner relied on the statute as a defense to a suit for an account instituted by the executor of a deceased partner. The deceased partner had died more than six years before the filing of the bill, and the right of his executor had never been recognized; the surviving partner, however, had continued the partnership business, and had got in outstanding assets within six years. Vice-Chancellor Wood held that the statute was not a bar to the suit; but the decision was reversed by Lord Chelmsford on appeal, and the house of lords affirmed Lord Chelmsford's decision.

In a still more recent case it has been held that the statute of limitations affords a good defense to an action for an account of the dealings and transactions of a partnership [511] which has been dissolved more than six years before the commencement of the action. (*u*)

**Effect of acknowledgment.**— With reference to acknowledgments it has been held in a partnership case, where no account had been come to for six years, that a signed

(*s*) *Noyes v. Crawley*, 10 Ch. D. 31. See some remarks as to the effects of the statute between partners in *Winter v. Innes*, 4 M. & Cr. 111, and *Way v. Bassett*, 5 Ha. 68.

(*t*) L. R. 5 H. L. 656. See 19 and 20 Vict. ch. 97, § 9. *Miller v. Miller*, 8 Eq. 499, is hardly consistent

with this, unless it be upon the ground that there was no dissolution, or that there was a trust deed excluding the statute. See the observation of Malins, V.-C., in 10 Ch. D. 37.

(*u*) *Noyes v. Crawley*, 10 Ch. D. 31.

acknowledgment of liability to account in respect of matters more than six years old was sufficient to justify a decree for an account in respect of them, although the acknowledgment did not contain an admission that anything was due, nor any express promise to pay what might be found due on taking the account. (x)<sup>1</sup>

**Payment by a receiver in a suit.**—Where a partnership account is agreed to be taken, and a receiver is appointed,<sup>2</sup> a payment<sup>3</sup> made by the receiver to one of the partners on account of a debt owing to him by another partner is not sufficient to prevent the statute from being a bar to such debt. (y)

(x) See *Prance v. Sympton, Kay*, 678. The expression was: "You and I must go into it and settle the account." See, also, *Banner v. Berridge*, 18 Ch. D. 254; *Skeet v. Lindsay*, 2 Ex. D. 314. Compare *Mitchell's Claim*, 6 Ch. 822.

<sup>1</sup>R. and J., brothers, were in partnership. R. having died, J. frequently acknowledged his liability to account to R.'s estate, agreed to two amicable references, etc. *Held*, that this was a continuing admission of liability to account so as to suspend the running of the statute of limitations. *Shelmire's Appeal*, 70 Pa. St. 281.

<sup>2</sup>The appointment of a receiver for the benefit of all firm creditors suspends the running of the statute of limitations in equity against claims by firm creditors for the payment of firm debts out of firm assets in the receiver's hands. *Kirkpatrick v. McElroy*, 41 N. J. Eq. 539.

<sup>3</sup>As to a payment on account not constituting a settlement of accounts, see *McKelvy's Appeal*, 72 Pa. St. 409.

Payment of the deceased part-

ner's share of damages recovered in a suit for the destruction of the partnership property is not such a payment upon the general account of the partnership business as will remove the bar of the statute of limitations. *McKeown v. Guild*, 12 Chicago Legal News, 18.

The fact that within the six years a certain sum had been paid over to the plaintiff's solicitor, without his knowledge, as the full amount of the partnership profits due to the plaintiff, does not take the case out of the statute. *Cotton v. Mitchell*, 3 Ont. 421.

Where, after an accounting upon dissolution, defendant promised to pay the balance with interest, and, after the expiration of the statutory period of limitation, payments were made on a new balance then agreed upon, such payments are sufficient to keep the old claim alive so as to make it a legal foundation for a new accounting. *Miner v. Lorman*, 59 Mich. 480; S. C. 56 Mich. 212.

(y) *Whitley v. Lowe*, 25 Beav. 421, and 2 De G. & J. 704.

**Cases where the statute affords no defense.**— It must be remembered that the statute of limitations does not apply to cases of express trust<sup>1</sup> or of concealed fraud.

<sup>1</sup>Partners stand in the relation of trustees to each other, and something must be done to render that relation adverse before the statute of limitations will begin to run. *Rencher v. Anderson*, 95 N. C. 208.

Partners *inter sese* are trustees as to firm property held by them after dissolution, but the trust is implied, not express. Hence actions between them relating thereto are subject to the statute of limitations. *Coudrey v. Gilliam*, 60 Mo. 86; *McKeown v. Guild*, 12 Chicago Legal News, 18 (a surviving partner).

The statute does not necessarily begin to run from date of dissolution. Its operation commences with a breach of trust by the partner having partnership property or accounts in charge. And as a general rule the breach takes place after a failure to account and settle within a reasonable time after dissolution, and must be ascertained from the particular circumstances of each case. Where an account has been stated between them at the close of the partnership, the statute, as to the items embraced therein, runs from the time of the statement. Where mutual arrangement, after dissolution, delegates to one member the collection of debts due the firm, no cause of action accrues against him in favor of his copartner, nor does the statute begin to run so long as a faithful discharge of that duty postpones a final settlement. *Cou-*

*drey v. Gilliam*, *supra*; *McNair v. Ragland*, 3 Murph. 139.

In 1865, after June 1st, a partner retired, selling out to his copartner his interest (one-half) in the stock at cost or invoice prices. The retired partner died, and in October, 1866, administration was granted upon his estate. A suit was commenced against the administrator in August, 1873, by the former partner of the intestate upon a certain award, to which suit the administrator pleaded, in January, 1874, among other things, that at the time of the dissolution the stock was worth over \$1,500, and that he, the administrator, claimed to be entitled to one-half thereof, with interest. He neither offered expressly to set off the claim, nor prayed judgment therefor. The action and plea remained pending until February, 1877, when the action was voluntarily dismissed by the plaintiff therein. The administrator, in July thereafter, filed the present bill to recover for his intestate's interest in the stock. The bill was held to be barred by the statute of limitations, and a demurrer containing that ground, among others, was held to have been properly sustained. *Crane v. Barry*, 60 Ga. 362.

Where one partner is left, by agreement, with the assets to dispose of whenever he can do so at a fair price, a continuing trust is thereby created, and the statute of limitations will not begin to run against the right to an account so

Therefore, if a partner has died, having by will disposed of his property on trust for payment of his debts, this is sufficient to justify a decree for an account of partnership transactions in respect of which claims existed when he died, although more than six years have elapsed since that time, and before the commencement of the action. (z) Again, in cases of breach of trust and of fraud, there seems to be no limit to the time at which a court will interfere and afford redress to the parties aggrieved. The mere lapse of thirty or forty years since the right first accrued is insufficient to bar the remedy in such cases.

In *Stainton v. The Carron Company*, (a) the management of the affairs of the company was intrusted to a person who was entitled to one-sixth of the shares in it. He was the manager of the company from 1808 until 1851, when he died. For twenty-five years he rendered accounts regularly, \*and these accounts were never questioned [\*512] during his life. But after his death it was discovered that upwards of 2,000*l.* a year for many years had not been properly accounted for by him, and the company claimed from his estate nearly 70,000*l.* in respect of this annual deficiency, and asserted a lien for this sum on his shares and assets in the hands of the company. Notwithstanding the lapse of time, and the reception without dispute of the accounts sent in by the manager from year to year, a decree was made opening the whole account from the year 1825 down to his death. (b)

**3. Account stated.**—To an action for an account of partnership dealings and transactions, an account thereof already stated and settled between the parties (c) affords a

long as the party to whom the assets were delivered acts under the trust or admits it as continuing. *Mac. & G. 87; Wedderburn v. Wedderburn*, 2 Keen, 722, and 4 M. & Cr. 41.

*Causler v. Wharton*, 62 Ala. 358.

(z) *Ault v. Goodrich*, 4 Russ. 434.

(a) 24 Beav. 346.

(b) See, too, *Allfrey v. Allfrey*, 1

(c) Of course the maxim, *Res inter alios*, etc., applies to settled accounts, *Carmichael v. Carmichael*, 2 Ph. 101.

good defense. (d)<sup>1</sup> No precise form is necessary to constitute a stated and settled account; but an account stated,

(d) *Taylor v. Shaw*, 2 Sim. & Stu. 12; *Endo v. Caleham*, You. 306. An account settled by a majority was held binding on the minority in *Robinson v. Thompson*, 1 Vern. 465. See, too, *Stupart v. Arrow-smith*, 3 Sm. & G. 176, and *Kent v. Jackson*, 2 De G. M. & G. 49.

<sup>1</sup> *Near v. Lowe*, 49 Mich. 482; *Wells v. Erstein*, 24 La. Ann. 317; *Kidder v. McIlhenny*, 81 N. C. 123; *Wagner v. Wagner*, 50 Cal. 76; *Cayton v. Walker*, 10 id. 450; *Silver v. St. L., Iron Mt. & T. R'y Co.* 5 Mo. App. 381; *Gage v. Parmalee*, 87 Ill. 329; *Hanks v. Baber*, 53 id. 292; *Edgar v. Baca*, 1 N. Mex. 613; *Gleason v. Van Aernam*, 9 Oreg. 343; *Mahnke v. Neal*, 23 W. Va. 57; *Kellogg v. Moore*, 97 Ill. 282; *Hunter v. Aldrich*, 52 Ia. 442; *Keough v. Foreman*, 33 La. Ann. 1434; *Kelly v. Devlin*, 58 How. Pr. 487; *S. C.* 47 N. Y. Super. Ct. 555; *Hart v. Finnigan*, 71 Cal. 578. See, also, *Wood v. Fox*, 1 A. K. Marsh. 451, and the cases cited below.

As to the requisites of a plea of an account stated and settled in bar to a bill for an account, see *Harrison v. Farrington*, 36 N. J. Eq. 107; *S. C.* 38 id. 358; 40 id. 353.

Balance due from one partner to another after final settlement is not a partnership but a separate debt. *Hulse's Estate*, 12 Phila. 130.

Plea of account stated not sustained by evidence showing the amount due the complainant had been arrived at from inventories loosely made and accounts loosely stated in bulk by defendant, but that no such fair and just statement was admitted as would en-

able complainant to define his rights, defendant's testimony being contradictory and his previous assertions vague and unintelligible. *Harrison v. Farrington*, 10 Atl. Rep. (N. J.) 105; *S. C.* 8 Cent. Rep. 550.

Where the books of a partnership showed that at different times the individual accounts of the partners had been balanced and marked "settled," or with expressions to that effect, *held*, that this did not constitute a settlement, or an account stated, of the partnership affairs to that date, nor would the statute of limitations run thereon as upon an account stated. *Rhyne v. Love*, 4 So. East. Rep. (N. C.) 536.

In a suit for a dissolution an answer that on a day certain the partners accounted, and have made no new contracts since, does not make it improper for the court to order an account without first determining the truth of the answer. *Kennedy v. Shilton*, 1 Hilt. 546.

Where there has been a partial settlement of the partnership account, and there is no valid objection to the settlement, it is conclusive upon the parties to it as far as it goes, and leaves open only the unsettled portion of the account. *Foster v. Rison*, 17 Gratt. 321; *Parkhurst v. Muir*, 7 N. J. Eq. 555.

Where the jury find that a note in suit was given in settlement of the final balance due on partnership transactions, all inquiry into the articles of copartnership is immaterial. *Kidder v. McIlhenny*, *supra*.

Where, however, there has been a dissolution and a final settlement,



unless it be in writing, is no defense to an action for a further account. It is not, however, necessary that the account

and a note given for the balance ascertained to be due, with the stipulation that the errors and omissions in the settlement may be deducted as payments on the note, a court of law, in an action on the note, may allow such errors and omissions as a defense to the action. *Frink v. Ryan*, 3 Scam. 322.

So a settlement between two partners, whereby one buys the other's interest in the partnership property, and gives his note for the amount found to be due the retiring partner, does not estop the maker of the note from pleading and showing, when sued on the note, that it was given for too much by mistake arising out of an erroneous charge against the maker of the note in the settlement. The fact that the maker received the note after discovery of the mistake by him, and while it was a matter of dispute, still insisting that it existed, does not vary the rule. *Hertz v. Clark*, 46 Ga. 649.

Two partners agreed that the partnership should be dissolved and the business closed, and that the partnership accounts should be considered and taken as if the partnership had never existed, and that the amount already received by one partner from the partnership should be his compensation paid by the other partner to him as an employee, and that the other partner should collect the debts due the firm, and pay the debts due by the firm; and the agreement was acted on. *Held*, that the partner who received the compensation as an employee had no further interest in the

partnership accounts and could not maintain a suit for an accounting. *Wagner v. Wagner*, *supra*.

Where the petition in a suit between partners was for a balance stated upon an accounting, and the answer, after setting up the statute of limitations, admitted the partnership, its dissolution and a large partnership account, denying the striking of a balance by the parties, but claimed a balance in the defendant's favor and prayed for an accounting and judgment; and where both parties in open court assented to an order made for taking an account before a referee, which was taken, *held*, that by assenting to the taking of the account plaintiff abandoned his claim to recover as upon an account stated, and defendant waived any bar to the claim of plaintiff, and the action became an equitable one for a final accounting between former partners. *Auld v. Butcher*, 2 Kan. 135.

A. and B. formed a partnership, agreeing, by an indenture, that A. should put in \$20,000, that B. should transact the firm's business, that the profits should be divided in the proportion of 17 to 7, and that A. might draw out \$2,500 and B. \$300 annually. The partnership was dissolved and the goods divided; and it was then agreed that A. should estimate the profits and B. should elect whether to buy A.'s interest, or sell his own, according to that estimate. A. estimated the profits at \$25,500, and B. elected to take the effects and pay A. his share of the profits. A memoran-

should be signed by the parties,<sup>1</sup> if it can be shown to have been acquiesced in by them; (e) and an account may be

dum was also made by A. and B. of certain items which were to be left to arbitrators. A. brought a bill to obtain an account from B. *Held*, that the agreement, after dissolution, was not void for uncertainty because of its silence as to interest on the amounts withdrawn by the partners, nor because the disputed items were excluded from it. *Miller v. Lord*, 11 Pick. 11.

Where several persons entered into a copartnership to trade in plank and lumber, and some years after made a settlement, in which the parties mutually signed a paper purporting to be "a settlement of their plank and lumber account," *held*, that the presumption that such settlement was a dissolution of the partnership was not repelled by a recital in the memorandum that the parties were to be entitled to certain proportions of the profits when ascertained; but that it rather imported a final settlement

of the business, and postponed a division of the profits until the uncollected balances were made available, and that a party pleading such settlement was estopped from opening it. *Ferguson v. Hite*, 9 Dana, 553.

Where it appeared that during a copartnership of eight years' duration there had been occasional calculations of interest and summing up of results, and a division of profits, but no surrender of vouchers or cancellation of books, nor release, nor receipt in full, *held*, that the transactions were not of such a conclusive nature as to bar an account. *Lynch v. Bitting*, 6 Jones, Eq. 238.

A final settlement is conclusive that the surviving partner fully administered upon the partnership estate. *State v. Myers*, 9 Mo. App. 44.

A final settlement of a partnership estate made, without notice,

<sup>1</sup> See *Jessup v. Cook*, 6 N. J. L. 434.

Where, in an action for a partnership settlement, under the plea of a settlement made and release granted, defendant produces and relies on a private instrument written and signed by plaintiff alone, in which the latter, after mentioning various partnership transactions, declares that the partnership has been fully settled and grants full acquittance thereof to defendant, but the document stands alone without explanation or corroboration, and the other evidence is conclusive that no settlement had been

made, the instrument will have the same effect to establish plaintiff's partnership interest as if written by defendant himself; and a verdict for plaintiff will be sustained. *Denton v. Erwin*, 6 La. Ann. 317.

(e) See *Hunter v. Belcher*, 2 De G. J. & Sm. 194; *Morris v. Harrison*, Colles, 157; *Willis v. Jernegan*, 2 Atk. 252. See on this defense in general, Beames' *Pleas in Equity*, 222, and Mitford, 302. 5th ed. A verbal account and a receipt in full is not equivalent to a stated account. *Walker v. Consett*, *Forest*, 157.

stated and settled although a few doubtful items are omitted. (f) It is to be observed that the fact that an account

by the administrator, has not the effect of a judgment, and is open to review. *State v. Donegan*, 83 Mo. 374; S. C. 12 Mo. App. 190.

A settlement made by a surviving partner, under the provisions of the first article of the administration act of 1845 (Rev. Code, 1845, 70), is evidence in favor of the representative of the deceased partner against the survivor as an admission. *State v. Baldwin*, 31 Mo. 561.

In a settlement between two partners it was agreed that "S. is due L. \$295.86 to make him equal with the said L. in the outlays." *Held*, that the true construction is that S. owes to L. (not to the firm) the said sum. *Little v. Stanton*, 32 Pa. St. 299.

On the dissolution of a partnership between A. and B., B. was to retain the goods of the firm and A. was to have all the lands and all the debts due the firm, and pay all the debts due from them, and, by a clause added at the suggestion of A., at the close of the articles of dissolution, they were to operate as a receipt for all demands then existing between A. and B., as exhibited by the books of the firm, with a few exceptions specified. *Held*, that A. thereby approved and ratified a payment by B. of an individual debt, the entry of which was made upon the books, and which entry the clerk testified he had shown to A., who said "that it was of no account and would make no difference." *Brewster v. Mott*, 4 Scam. 378.

On the dissolution of a firm without taking an account it was agreed between them that one should take a certain amount of the effects, and the other the residue and "pay all the debts due from the firm." The former had before advanced to the firm and taken his partner's memorandum for the same. *Held*, that by the settlement he was precluded from claiming such memorandum as a "debt due from the firm." *Patterson v. Martin*, 6 Ired. L. 111.

Where an account of the mutual dealings of two firms, of both of which A. was a member, had been stated, and all the partners of the creditor firm, save A., who refused to join as plaintiff and was made defendant, brought an action against the debtor firm, *held*, that the plaintiffs were entitled to judgment for the balance on the account stated, and that facts appearing that would render a recovery without adjusting the accounts of the individual member inequitable, such adjustment would be directed by the court. *Cole v. Reynolds*, 18 N. Y. 74.

On the dissolution of a copartnership between S. and P. it was agreed that S. should settle the partnership concerns; and the agreement between them in writing contained the clause "that the accounts of the partners shall be made equal by the said S. selecting and taking to his own account from the assets or effects of the firm an amount sufficient to equal-

---

(f) *Sim v. Sim*, 11 Ir. Ch. 310.

has already been *rendered* by the defendant to the plaintiff does not deprive the latter of his right to have the same account taken under the direction of a court; (g) to have that effect an account must not only have been sent in to the plaintiff, but also have been acquiesced in by him. (h)<sup>1</sup>

It is further to be observed that, although the [\*513] \*principle on which accounts have been kept may have been acquiesced in, the items may not. (i)<sup>2</sup>

**Impeaching a settled account on the ground of fraud and mistake.**—A settled account may be impeached either wholly or in part on the ground of fraud or mistake.<sup>3</sup> If there be fraud, or if any mistake affects the whole account,

ize the accounts of said partners, with interest.” *Held*, that this clause did not release P. from liability for loss to the partnership, nor from his liability to pay to S. the amount which might be due him after settling the concern; and that it did not show an intention that S. should apply doubtful or uncollectible debts due the firm in payment of the amount due him at their nominal value. *Sayre v. Peck*, 1 Barb. 464.

A sale by one partner of his interest in the business to a third party, followed by his purchase of his former partner's interest at a fixed price, is presumptive evidence that all the former accounts were settled or at least merged in the new agreement. *Norman v. Hudson*, 64 Ill. 11.

So where one partner transfers his interest in the assets, including firm books and accounts, to a continuing partner, receiving in payment his note, the latter cannot afterwards set off an account apparently due the firm from the former, the presumption being that the account of the retiring member

was adjusted in ascertaining the value of his interest. *Thompson v. Lowe*, 111 Ind. 272.

(g) See *Clements v. Bowes*, 1 Drew. 692.

(h) *Irvine v. Young*, 1 Sim. & Stu. 333.

<sup>1</sup>To constitute a settlement of accounts between partners, all must consent and be bound by it or none can be bound. *Lamalere v. Caze*, 1 Wash. 435; *Cooper v. Frederick*, 4 G. Greene, 403; *Rehill v. McTague*, 18 Weekly Not. Cas. 498.

(i) See *Mosse v. Salt*, 32 Beav. 269; *Clancarty v. Latouche*, 1 Ball & Beatty, 420. Compare *Hunter v. Belcher*, 2 De G. & Sm. 194.

<sup>2</sup>See *Abrahams v. Hunt*, 26 Pa. St. 49; *Silver v. St. L., Iron Mt. & S. R'y Co.* 5 Mo. App. 381; *Gage v. Parmalee*, 87 Ill. 329; *Clouch v. Mayer*, 23 Kan. 404; *Kellogg v. Moore*, 97 Ill. 282; *Mahnke v. Neal*, 23 W. Va. 57; *Groenendyke v. Coffeen*, 109 Ill. 325; *Farnsworth v. Whitney*, 74 Me. 370; *Black v. Merrill*, 65 Cal. 90.

A deed of final settlement between partners will not, however,

the whole will be opened and a new account will be directed to be taken without reference to that which has been

be disturbed except for the most cogent reasons. *Murray v. Elston*, 24 N. J. Eq. 310.

Error in the settlement, resulting from the gross negligence of the complainant, will not entitle him to relief. *Keough v. Foreman*, 33 La. Ann. 1434.

A long-settled account will not be opened and disturbed unless upon clear and positive evidence of error of material facts or fraud or undue influence. *Keough v. Foreman*, 33 La. Ann. 1434; *Hunt v. Stewart*, 53 Md. 225.

After the settlement of partnership and passing of mutual receipts one partner cannot have the settlement vacated for fraud or mistake unless the specific acts of fraud are averred or the particular mistake relied upon distinctly set forth. A general averment of fraud and mistake will not suffice. *Loesser v. Loesser*, 81 Ky. 139; *Mahnke v. Neal*, 23 W. Va. 57.

It is not absolutely necessary that a balance should be struck of partnership accounts before a final settlement can be made by the parties in interest. A satisfactory conclusion by which to base a final settlement may be reached otherwise, and if such settlement is had, there being no fraud, concealment or overreaching, in which the parties acquiesce for many years, it may be regarded as final and a bar to the account. *Groenendyke v. Coffeen*, 109 Ill. 325.

In an action to set aside a settlement made by other partners with a firm debtor on the ground of collusion and fraud, the plaintiff,

on proof of the fraud alleged, is not entitled to have the settlement set aside or to recover the debt which was discharged for his proportion thereof, but to recover the damages sustained by him, which are only a diminution of his partnership share by collusive waste of the assets, and this can only be ascertained by an accounting. *Sweet v. Morrison*, 103 N. Y. 235.

Although a partner at and before the time of making a settlement of the partnership account and selling his interest to his copartner may have been under great financial embarrassment and under indictment as an officer for embezzlement, yet if he is a free agent and has ample time to deliberate, and procures a competent accountant to examine the books of the firm, who makes a faithful examination, and submits the same, and the party objects as to certain matters, showing that he understands the business; and the proof also shows that he was familiar with it, and he finally makes a lumping trade, settling the business and disposing of his interest, and some time after ratifies the act by asking time to pay a balance, a court of equity will not set aside the transaction, even though the copartner pressed him for a dissolution and settlement. *Gage v. Parmalee*, *supra*.

Where the active and managing partner was, by the articles of co-partnership, allowed a salary of \$1,000 a year for his services, and afterwards one partner sold out his interest and retired, and no new agreement was entered into, and,

stated; (k) but if there be no fraud, and if no mistake affecting the whole account can be shown, but the correctness of

as the business increased, the active partner charged on the books from time to time an increase in his salary, to which no objection was made by the other partner, although he often examined the books and had monthly statements furnished him, it was *held* that, after dissolution and settlement on the basis of the increased salary, this was no ground for setting the settlement aside. 87 Ill. 329, *supra*. See, also, *Brewster v. Mott*, 4 Scam. 378.

A settlement of partnership accounts between parties dealing with each other at arm's length will not be opened in equity merely on the ground of the impaired health and depression of spirits of one of the parties at the time, no unsoundness of mind being proved. *Billingslea v. Ware*, 32 Ala. 415.

A fair compromise deliberately made by partners in settling their accounts ought not to be disturbed on a bill for an accounting, if the parties had full opportunity to inform themselves and complainant does not show they were false charges or omissions of specific credit. *Harrison v. Dewey*, 46 Mich. 173.

One partner, when sued by the other on a note executed by the former to the latter in settlement of a general balance on a dissolution of their partnership, may im-

peach its validity for fraud without resulting to a direct action to annul the settlement. *Powell v. Graves*, 9 La. Ann. 435.

Where a partner, by concealing the profitable results of his outside speculations, and rendering a false balance sheet, obtained from his copartner a bill of sale of all of the latter's interest in the firm, *held*, that equity would apply the rule making partners each other's agents and trustees, and would grant appropriate relief under a prayer for a re-opening of the settlement and for general relief. The complainant was only bound to ordinary vigilance to prevent the accomplishment of the fraud. *Pomeroy v. Benton*, 57 Mo. 531.

In re-opening a settlement between partners alleged to have been procured by the fraud or mistake of the managing partner, trusted as such, equity will allow more latitude than where no confidence is reposed. *Merriwether v. Hardeman*, 51 Tex. 436.

Where a judgment is recovered at law by one partner against another in respect of the partnership dealings the defendant may still file a bill for an account, and if, upon a statement thereof, it appears that he owes the defendant nothing, the court may properly enjoin the collection of so much of such judgment as is shown to be

---

(k) *Williamson v. Barbour*, 9 Ch. D. 529; *Gething v. Keighley*, id. 547; *Clarke v. Tipping*, 9 Beav. 284; *Wharton v. May*, 5 Ves. 68; *Beaumont v. Boulton*, id. 485, and 7 Ves. 599; *Bilfrey v. Allfrey*, 1 Mac. & G. 87; *Coleman v. Mellersh*, 2 id. 309.

some of the items in it is, nevertheless, disputed, the account already stated will not be treated as non-existing, but will

inequitable and unjust. *Gregg v. Brower*, 67 Ill. 526.

In the case of a mistake in the settlement of a partnership account, where both parties had equal opportunities of knowing the mistake, and there has been no fraud or concealment, equity will not correct the mistake. *Belt v. Mehen*, 2 Cal. 159. See, however, *Hertz v. Clark*, *ante*, p. 512, note.

Where partners agree upon the value of firm property divided upon dissolution, such agreement, in connection with transfers, constitutes the real settlement between the parties, and will not be affected by any error of computation, by reason of which a wrongful balance was struck. *Donahue v. McCosh*, 30 N. W. R. 14.

Nor will such settlement be affected by the fact that the property transferred to one partner by the other did not amount to as much as he supposed it would. *Donahue v. McCosh*, 30 N. W. R. 14.

A court of equity may correct errors in the settlement of partnership affairs when they arise from misrepresentations innocently made by one or more members of the firm. *Stephens v. Orman*, 10 Fla. 9.

N. and J. entered into an agreement to dissolve partnership in December, 1861. By the terms of the agreement the books were to be balanced, excluding all doubtful debts, and the amount due N. ascertained, and J., with others, was to purchase his interest and continue the business. The cash balance against N. was found to be

\$1,800, by one of the new firm who had charge of the books, the suspended debts amounting to a much larger sum than was expected. This was not disclosed to the complainant, but he was allowed to execute the contract under the belief that there would be a balance in his favor. N. was to share in the suspended debts as fast as they were collected. N. entered the service of the new firm, and continued till April, 1861. In October, 1862, he filed his bill to set aside his agreement and be reinstated in the firm. *Held*, this was not such a mistake as would entitle the complainant to relief in equity. *Nicholson v. Janeway*, 16 N. J. Eq. 285.

Plaintiff proposed to purchase the interests of his copartners in a firm business; the book-keeper made out a statement of accounts in which the private accounts of the partners were included as assets. The agent acting for the other partners refused to sell upon that basis, but made a statement in which the private accounts were set down as profits, and offered to sell with that statement as a basis. Plaintiff, with full knowledge of the difference in the statements, accepted the proposition, and the sale was completed. Plaintiff gave notes, which he subsequently paid as they became due, and never offered to return the property. In an action for an accounting, *held*, that these facts authorized a finding that there was no material mistake of fact, and that plaintiff was entitled to no equitable relief. *Stitthimer v. Killip*, 75 N. Y. 282.

be acted upon as correct, save so far as the party dissatisfied with any item can show it to be erroneous. (*l*) In a case of fraud, an account will be opened *in toto*, even after the lapse of a considerable time; (*m*)<sup>1</sup> but, if no fraud be proved, an account which has been long settled will not be re-opened *in toto*; the utmost which the court will then do will be to give leave to surcharge and falsify; (*n*) and there are cases in which, in consequence of lapse of time, the court will do no more than itself rectify particular items, instead of giving leave to surcharge or falsify generally. (*o*)<sup>2</sup> Moreover, the

(*l*) *Holgate v. Shutt*, 27 Ch. D. 111, and 28 id. 111; *Gething v. Keighley*, 9 id. 547; *Pitt v. Cholmondeley*, 2 Ves. Sr. 565; *Vernon v. Vawdry*, 2 Atk. 119.

(*m*) *Williamson v. Barbour*, 9 Ch. D. 529; *Allfrey v. Allfrey*, 1 Mac. & G. 87; *Stainton v. The Carron Co.* 24 Beav. 346. See *Vernon v. Vawdry*, 2 Atk. 119; *Beaumont v. Boulton*, 5 Ves. 485.

<sup>1</sup> Where it appears that a settlement was obtained by deceit and misrepresentation as to some matters, it does not follow that the entire settlement must be set aside and a new accounting ordered. If the misrepresentation was only as to some minor matter, and the settlement, as a whole, does not appear to have been fraudulently made, the court may simply correct the particular wrong and leave the settlement undisturbed. *Turner v. Otis*, 30 Kan. 1.

(*n*) See *Gething v. Keighley*, 9 Ch. D. 547; *Millar v. Craig*, 6 Beav. 433; *Brownell v. Brownell*, 2 Bro. C. C. 61, and 1 Mac. & G. 94.

(*o*) See *Twogood v. Swanston*, 6 Ves. 485; *Maund v. Allies*, 5 Jur. 860.

<sup>2</sup> A settlement between partners, which does not appear to have been unfair, will not be disturbed at the

instance of one who has not within a reasonable time repudiated its terms nor taken any steps to rescind it. *McGunn v. Hamlin*, 29 Mich. 476; *Steadwell v. Morris*, 61 Ga. 97. See, also, *Groenendyke v. Coffeen*, 109 Ill. 325.

In the absence of fraud or mistake affecting the whole account stated between partners, such account will be deemed correct except as to such specific items as can be shown erroneous by the parties seeking to impeach the settlement. *Hunter v. Aldrich*, 52 Ia. 442. See, however, *Hunt v. Stewart*, 53 Md. 225.

A credit to a partner appearing upon the books of a firm, and distinctly ascertained, will be regarded as having been included in a partnership settlement which was evidently meant to leave nothing unprovided for. *Lambert v. Griffith*, 50 Mich. 286.

In an action for dissolution and account, where a partial settlement has already been had between the partners, the accounting should be limited to the unsettled portion of the firm's business. *Stretch v. Talmadge*, 65 Cal. 510; *Stage v. Gorch*, 107 Ill. 361.

Where, after dissolution, the



mere fact that items are treated in an improper way, or are improperly omitted, is not of itself sufficient to induce the court to open a settled account; for, if the items in question were known to the parties, and there be no fraud or undue influence proved, the court will infer that the partners agreed to treat the items as they in fact did treat them. (*p*) But an item omitted by mutual mistake will be set right. (*q*)

\*If a settled account is impeached for errors, particular errors must be stated and proved; (*r*) and the same rule holds where the account is settled, "errors excepted." (*s*)

**Mistakes of law.**—In surcharging and falsifying, errors of law as well as errors of fact may be set right; (*t*) and where leave is given to one party to surcharge and falsify, similar leave is thereby also accorded to his opponent. (*u*)

**Accounts stated on the death of a partner.**—On the retirement or death of a partner it is usual for an account to

partners adjust their accounts so far as they occur to them at the time, and separate under an agreement to meet again and divide some partnership lumber, and then finish their settlement and never do anything further, this is not a final settlement. *Gleason v. Van Aernam*, 9 Or. 343.

Where parties have fully stated an account of their dealings, and have adjusted balances on the basis of such statement, the account will not be surcharged or falsified at the suit of either party without clear and satisfactory proof of fraud or mistake. *Hoyt v. McLaughlin*, 52 Wis. 280.

After judgment recovered at law for a balance found due from one partner to the other, upon a statement of partnership accounts, the defendant in the judgment cannot maintain a bill to surcharge and

falsify the accounts as stated without first showing good cause for setting aside the judgment. *Broda v. Greenwald*, 66 Ala. 538.

(*p*) See *Maund v. Allies*, 5 Jur. 860, L. C.; *Laing v. Campbell*, 36 Beav. 3, where bad debts were treated as good.

(*q*) *Pritt v. Clay*, 6 Beav. 503.

(*r*) *Parkinson v. Hanbury*, L. R. 2 H. L. 1; *Dawson v. Dawson*, 1 Atk. 1; *Taylor v. Haylin*, 2 Bro. C. C. 310; *Kinsman v. Barker*, 14 Ves. 579. See *Whyte v. Ahrens*, 26 Ch. D. 717.

(*s*) *Johnson v. Curtis*, 2 Bro. C. C. 311, note.

(*t*) *Roberts v. Kuffin*, 2 Atk. 112. And see *Daniell v. Sinclair*, 6 App. Ca. 181.

(*u*) 1 Madd. Ch. 144, where it is said to have been so held by V.-C. Leach in *Anon.* 6 March, 1821.

be stated between him or his representatives on the one hand, and the continuing partners on the other, and for mutual releases to be given. Afterwards attempts are occasionally made to open the accounts thus stated, and to set aside the releases, and to have a new account taken, and a fresh settlement of the partnership affairs. In such cases as these, before the settled accounts can be opened, the release must be set aside. (x) Whether this can be done or not depends upon circumstances, which will be found discussed under the title *Rescission of Contract*. (y)

In taking accounts under an ordinary judgment, settled accounts are never disturbed unless specially directed so to be. (z)

**4. Award.**—Another defense to an action for an account is that the matters in difference between the partners have been settled by arbitration.

**Agreements to refer to arbitration.**—A mere agreement that the matters in question should be referred has frequently been held to be no defense to an action in respect of them. (a)<sup>1</sup> But if those matters have actually been disposed of by the award of an arbitrator, they cannot afterwards be made the foundation of any action between [\*515] the parties on whom the award is binding. (b)

**Award.**—But an award will not avail as a defense to the action if the account sought by it is different from that to

(x) See *Millar v. Craig*, 6 Beav. 433; *Fowler v. Wyatt*, 24 Beav. 232. And see *Parker v. Bloxham*, 20 Beav. 295.

(y) *Ante*, p. 432 *et seq.*

(z) See *Holgate v. Shutt*, 27 Ch. D. 111, and 28 *id.* 111; *Newen v. Wetten*, 31 Beav. 315. But see *Milford v. Milford*, MacCl. & Y. 150.

(a) *Thompson v. Charnock*, 8 T. R. 139; *Michell v. Harris*, 4 Bro. C. C. 312. See *ante*, p. 451 *et seq.*

<sup>1</sup> *Page v. Marshall*, 6 Phila. 264. Partners are not precluded from making a partial settlement by arbitration because the partnership concerns are not in a state to be finally settled. *Kendrick v. Tarbell*, 26 Vt. 416.

As respects the degree of certainty of an award upon the submission of the accounts between partners, see *Cochran v. Bartle*, 3 S. W. R. 854.

(b) *Tittenson v. Peat*, 3 Atk. 529;

which the award applies. (c) So an award on a reference of all matters in difference is no defense to an action for an account of moneys received after the making of the award, and not dealt with by it, owing to a mistake on the part of the arbitrator. Thus, in *Spencer v. Spencer*, (d) the partners on a dissolution referred all matters in difference to arbitration. The arbitrator awarded that one of the partners should get in the outstanding debts, which were estimated by the arbitrator at a certain amount. The award was acted on, but it appeared that the debts ultimately got in amounted to more than the sum at which they had been estimated. One of the partners claimed a share of the difference between the estimated and the actual amount of these debts, and as it was plain that the award had proceeded on a mistake, an account was directed, notwithstanding all matters in difference had been referred.

With respect to agreements to refer, an important enactment is contained in the Common-law Procedure Act, 1854, section 11, as has been already pointed out. (e)

**5. Payment, and accord and satisfaction.**—Payment, *per se*, is not a defense to an action for an account; for the subject of such an action is to ascertain how much is or was payable.<sup>1</sup> But payment of a sum of money, and acceptance of it in lieu of all demands, is equivalent to accord and satisfaction, which is as much a defense to an action for an account as is a release. (f)

**Accord and satisfaction.**—With respect to accord and satisfaction it is to be observed that there must be no un-

*Routh v. Peach*, 2 Anst. 519, and 3 id. 637.

(c) As in *Farrington v. Chute*, 1 Vern. 72.

(d) 2 Y. & J. 249.

(e) *Ante*, p. 452.

<sup>1</sup> In a suit between partners for an accounting the defendant may show that he has paid partnership funds to plaintiff for a partnership use, and that the plaintiff admitted

that he used them for his own private purposes, notwithstanding it appears that defendant and another, as partners, had before sued the partner receiving such money and failed to recover the same. *Kitson v. Hillabold*, 95 Ind. 136.

(f) See Bac. Ab. Accompt, E.; Vin. Ab. Account, N.; *Brown v. Perkins*, 1 Ha. 564. But see Com. Dig. Accompt, E. 6, pl. 8.

certainty in the agreement relied on as an answer to the action for an account, and that it must be shown that such agreement has been performed; for in the performance lies the satisfaction. (*g*) On these grounds the [\*516] \*late Vice-Chancellor Wigram, in a suit for an account by the executors of a deceased partner against the surviving partner, overruled a plea that it was agreed between the defendant and the deceased that all accounts between them, and all claims of the deceased in respect of the partnership, should be waived; and that in consideration thereof the deceased should be permitted to carry on business alone, without any further question or dispute by the defendant, which the deceased accordingly did. (*h*)

**Waiver.**—However, if an agreement to waive all accounts is entered into, and is founded on a sufficient consideration, and is free from all taint or fraud and undue influence, the parties to it will be precluded from suing each other in respect of the accounts so agreed to be waived. (*i*)

**6. Release.**—A release is a good defense to an action for an account. (*k*) But where the release has been executed on the faith of the correctness of certain accounts, which are afterwards ascertained to be incorrect, the release will be set aside, and a fresh account will be ordered, (*l*) unless the parties clearly intended to abide by the accounts, whether correct or not. A release, moreover, can, of course, be set aside for fraud. A release, to be effectual as such, must be under seal. A release not under seal is regarded as a stated account. (*m*)

(*g*) Com. Dig. Accord (B. 3) and Clay, 6 Beav. 503; Wedderburn v. Wedderburn, 2 Keen, 722, and 4

(*h*) Brown v. Perkins, 1 Ha. 564. M. & Cr. 41; Millar v. Craig, 6

(*i*) See Sewell v. Bridge, 1 Ves. Beav. 433. And see Phelps v.

Sen. 297. Compare the last case. Sproule, 1 M. & K. 231. And see

(*k*) See Mitford, Pl. 304, ed. 5. ante, Account Stated, p. 512.

As to form of plea, see Brooks v. (*m*) Mitf. Pl. 307, ed. 5. See, as to agreements to waive accounts,

(*l*) See, for example, Pritt v. ante, notes (*h*) and (*i*).

(c) *Of judgments for a partnership account.*

**Judgments for account.**—A judgment for a partnership account in its simplest form is to this effect: “Let an account be taken of the partnership dealings and transactions between the plaintiff and the defendant from ——. And let what, upon taking the said account, shall be certified to be due from either of the said parties to the other of them be paid by the party from whom to the \*party [\*517] to whom the same shall be certified to be due.<sup>1</sup> Liberty to apply.” (n)

<sup>1</sup> A decree giving to an alleged partner a share in the avails of property purchased with partnership funds cannot be sustained, when there is no account taken between the partners, nor any

proof of the state of accounts between them. *Bowman v. O'Reilly*, 31 Miss. 261.

But payment of a dividend of profits may be decreed before the final distribution of the assets,

(n) Seton on Decrees, 1197, ed. 4, where several other useful forms will be found given and referred to. The reports of the following cases also contain useful precedents: *Binney v. Mutrie*, 12 App. Ca. 165; *Benningfield v. Baxter*, id. 181, as to the application of surplus assets; *Travis v. Milne*, 9 Ha. 157, decree against executors of a deceased partner who had traded with his assets; *Whetham v. Davey*, 30 Ch. D. 580, account at instance of a mortgagee of a partner's share; *Devaynes v. Noble*, 1 Mer. 530, account where one firm succeeded another; *Wedderburn v. Wedderburn*, 2 Keen, 752, account where one firm succeeded another, and the capital of a deceased partner was continued in trade; *Cook v. Collingridge*, Jac. 623, and more fully in 27 Beav. 456, *note*, sale of a testator's share set aside and account of subsequent profits and

good-will; *Crawshay v. Collins*, 15 Ves. 230, and 2 Russ. 347, account of subsequent profits; *Millar v. Craig*, 6 Beav. 442, setting aside a release and opening accounts; *Fereday v. Wightwick*, Tam. 262, declaration that property acquired by one partner was partnership property, and an account accordingly; *Wilson v. Greenwood*, 1 Swanst. 483, sale, receiver and account; *Blisset v. Daniel*, 10 Ha. 538, decree restoring a partner wrongfully expelled; *England v. Curling*, 8 Beav. 140, specific performance of agreement for a partnership; *Pillans v. Harkness*, Colles, 442, decree relieving a person who had been induced to become a partner by fraudulent representations; *Evans v. Coventry*, 8 De G. M. & G. 835, winding up insurance society account against directors for breaches of trust.

**Costs.**—In actions for an account of partnership dealings and transactions the ordinary rule formerly was to give no

where such dividend was to be made at stated periods. *O'Conner v. Stark*, 2 Cal. 153.

In a bill for an account filed by one partner against his copartners, after the termination of the partnership, all the partners, as well defendant as complainant, are regarded as actors, and the accounts must be stated by the auditor, and the concerns of the partnership and rights of the several partners finally adjudicated upon by the court as if each partner was a complainant filing a bill against his copartners. *Grove v. Fresh*, 9 Gill & J. 280; *Raymond v. Caine*, 45 N. H. 201; *Pratt v. McHatton*, 11 La. Ann. 260.

An account of all partnership matters is necessary before a final decree can be rendered in an action for an accounting by one partner against the other; all partnership matters should be adjusted by the decree. *Shearer v. Francis*, 5 S. West. Rep. (Ky.) 559; *Nims v. Nims*, 20 Fla. 204; *Thompson v. Lowe*, 111 Ind. 272.

In an action by one partner against the executor of his deceased partner for an account and decree for what may be found due him, the decree cannot be entered against the executor and execution issued thereon without an issue as to the possession of assets in the executor's hands being found in the affirmative. *Dickerson v. Wilcoxson*, 1 S. E. R. 636.

On a bill for an account between partners it is not proper to render a personal decree against one partner for the excess of his receipts

over his disbursements until his interest in firm assets has first been exhausted to make good the deficiency. *Rosenstiel v. Gray*, 112 Ill. 282.

As to the effect by way of estoppel of a decree upon a bill to settle partnership and to compel the several partners to account to each other in a court of competent jurisdiction in another state, where some of the partners are residents of different states, see *Hunter v. Stewart*, 23 W. Va. 549. See, also, *Hodges v. Bullock*, 10 Atl. Rep. (R. I.) 643.

An order of reference to state the accounts of a copartnership between its members will not be reversed as having been prematurely made before the existence of such copartnership had been established, when no exception was taken at the time the reference was made; when the right to a jury trial as to the existence of such association was expressly reserved in the order of reference, the copartnership being admitted in the answer, as to a single transaction, and the verdict afterwards rendered on the question reserved being in affirmance of a plaintiff's claim as to the existence of a copartnership. *McPeters v. Ray*, 85 N. C. 462.

As to what an order of reference on a bill for account and contribution should state, see *Christy's Appeal*, 92 Pa. St. 157; *S. C. 37 Leg. Intel.* 364.

As to the manner in which a master should state a report and account and the basis thereof be-

costs up to the decree directing the account; nor was this rule departed from except in cases of gross misconduct on

tween partners, see *Nims v. Nims*, 20 Fla. 204; *Groenendyke v. Coffeen*, 109 id. 325; *Snyder v. Hall*, 10 Bradw. 235.

As to the practice on master's report on a bill for an account, see *Curyea v. Beveridge*, 94 Ill. 424.

In an action brought by one partner against his copartner for an accounting, in which the answer, while admitting the partnership, denies the terms as alleged in the petition, and as a second defense claims damages for certain breaches by the plaintiff of the partnership contract, it is not error for the court to submit to one jury the question of the terms and duration of the partnership, then to refer to a referee to state and report the account between the partners, and finally to submit to a second jury the claims for damages. *Carlin v. Donegan*, 15 Kan. 495.

A decree in the settlement of a partnership should settle the whole matter, and the report of a master is defective where it does not state the account between each of the members of the firm as well as between the plaintiff and the others. *Craig v. Chandler*, 6 Colo. 54; *Eaton's Appeal*, 66 Pa. St. 483. See, also, *Felder v. Wall*, 26 Miss. 595; *Raymond v. Caine*, *supra*; *Griggs v. Clark*, 23 Cal. 427; *Warren v. Wheelock*, 21 Vt. 323; *Scott v. Lallor*, 18 N. J. Eq. 301; *McRae v. McKenzie*, 2 Dev. & Bat. Eq. 232; *Anderson v. Beebe*, 22 Kan. 768.

In a suit in equity between partners for a settlement no final decree can be made while debts due from the firm remain unadjusted,

unless the plaintiffs will deduct the amount of such debts from the sum which they seek to recover. *Tyng v. Thayer*, 8 Allen, 391; *Brinley v. Kupfer*, 6 Pick. 179.

Where, however, a court of equity has made a final decree dissolving a partnership and applying its effects to the payment of its debts, without judicially ascertaining the joint liabilities which the receiver is directed to pay, proceedings may be taken, with proper notice to the respondents, to ascertain the joint debts of the firm. *Hubbard v. Curtis*, 8 Iowa, 1.

If, on the dissolution of a partnership, certain partners receive more than their share of the assets, the exact amount so received by each partner should be ascertained and judgment entered accordingly in an action by a partner who has been wronged in the distribution against his former copartners. A joint judgment in such a case is erroneous. *Rhiner v. Sweet*, 2 Lans. 386.

In ordinary accounting between partners they are liable to each other severally, but not jointly. But where one of the partners is excluded from a participation in, or knowledge of, the business, and from all profits, and under such circumstances as to show concert of action among the other partners, the latter are liable jointly and severally to the partner excluded. *Bloomfield v. Buchanan*, 14 Or. 181.

A decree against surviving partners for accounting for assets of which they had jointly taken pos-

the part of the defendants. (o) But lately the rule has been to pay the costs of an action for dissolution from the com-

session should be against them jointly for the whole amount, and not severally for the sums into which they divided it between themselves. *Bundy v. Youmans*, 44 Mich. 376. See, however, *contra*, *Starr v. Case*, 59 Ia. 491.

Damages for the breach by a partner of his agreement to sell to his copartner an undivided part of certain property, and that the whole should thereupon be the property of the firm, cannot be allowed in the settlement of the partnership accounts. *Reid v. McQuesten*, 61 N. H. 421.

In a suit against copartners for a share of past profits the verdict should be against those only who have received more than their proportion, unless some reason appears why the others should refund or contribute. *Wadley v. Jones*, 55 Ga. 329.

In a suit by one partner against another for the settlement of a partnership and partnership accounts, after dissolution, where it appears that a large amount of the partnership debts and liabilities are unpaid, and for some of which there are judgments against the partners, and that one of the partners has collected more of the partnership funds than the other, ordinarily it is error for the court to decree personally for the money so collected, or any part thereof, in favor of one partner against the other, until the payment of the partnership debts are first provided

for. *Carper v. Hawkins*, 8 W. Va. 291.

The report of a referee stating a partnership account showed that the interest of the plaintiff in the firm exceeded that of the defendant by a certain sum. *Held*, that it was error to enter judgment for the plaintiff in that amount, but that a sale of the entire partnership property should have been ordered, with directions to pay the costs of court out of the proceeds, then to pay to the plaintiff the amount due him, and lastly, to divide the residue equally between the parties. *Lannan v. Clavin*, 3 Kan. 17.

Upon a bill by a partner against his partner's administrators and heirs, claiming a moiety of profits from the sale of certain lands, and an undivided half of lands unsold, a decree setting apart to the complainant a certain portion of the land in severalty is erroneous. *St. Clair v. Smith*, 3 Ohio, 355. See *post*.

Where partnership articles provide that one of the partners is to bear all losses arising from sales to irresponsible parties, it is improper, on a bill for an account, to render a decree against him personally for such sums as he has been restrained by injunction from collecting, and perhaps may never collect. But a colorable sale on credit in fraud of the other partner's rights should, in stating the account, be considered as a sale for cash. *Maher v. Bull*, 44 Ill. 97.

Upon a bill by a partner for an

---

(o) See *Hawkins v. Parsons*, 8 Jur. N. S. 452; *Parsons v. Hayward*, 4 De G. F. & J. 474.



mencement out of the partnership assets, unless there is some good reason to the contrary. (p) But where the

account of the partnership, if a balance is reported against him the defendant may have a decree therefor upon the plaintiff's bill. *Scott v. Portinnek*, 3 Edw. Ch. 70.

The decree of a court of equity on a bill charging a violation of a partnership agreement may fix upon a previous time at which the partnership shall be considered as having determined as between the parties. *Durbin v. Barber*, 14 Ohio, 311.

A decree recognizing plaintiff's right to an interest in a partnership between their ancestor and defendant, who was ordered to account, authorized the former to exercise all their rights as partners to protect and manage that interest, but, without passing upon, left the mode of exercising those rights to the necessity of the case and the interpretation given the partnership contract. *Held*, that plaintiffs were not entitled to a writ giving them the unreserved possession and administration of the partnership property. *Junek v. Hezeau*, 11 La. Ann. 731.

An assignee of one copartner's share in the property and assets of the firm is liable, even without notice, to all the equities of his assignor growing out of the copartnership; but a decree against the assignee on account of such equities is a decree *in rem*, it operating upon the property assigned, and a *fi. fa.* cannot be issued upon it against the assignee. *Hunt v. Smith*, 3 Rich. Eq. 465.

A reference, upon agreement of parties, to a master to take an account of all the assets of a copart-

nership except the W. oil-works "as the same stood on and up to" the day of the dissolution excludes the property appertaining to the W. oil-works at the date of the dissolution, and not that appertaining to them at the time of their conveyance to the partnership; as, for instance, two boats included in the deed thereof. *Bliffins v. Wilson*, 113 Mass. 248.

A bill by a partner, filed before the end of the term the partnership was to run, alleged violations of the partnership contract, and asked for the dissolution of the partnership, and that an account be taken. During the pendency of the suit the term of the partnership expired. A supplemental bill was filed by leave, stating this fact, and charging a misappropriation of the partnership assets by the defendant, and asking for an accounting between the parties. Answers to both bills and replications thereto were filed, and proofs were taken and the cause referred to a master, who made a report showing that there was due to the complainant, from one of the other partners, several thousand dollars, and considerable amounts due the firm. The court, on a hearing, and without any objection to the report, dismissed the bills. *Held*, that complainant was entitled to a decree settling the accounts and providing for disposition of firm effects, and that court erred in dismissing the bills. *Curyea v. Beveridge*, 94 Ill. 425.

(p) *Hamer v. Giles*, 11 Ch. D. 492, and see note (s), *infra*.

action is really instituted to try some disputed right, the unsuccessful litigant will be ordered to pay the costs up to the trial of the action. (*g*)<sup>1</sup> The costs of taking the accounts, etc., directed at the hearing are, although disputed, usually defrayed out of the partnership assets, and, [\*518] \*if necessary, by a contribution between the partners. (*r*) But the partnership debts and liabilities, including sums due from the firm to the partners in respect of advances or the like, must be paid out of the assets in priority to the costs. (*s*)

(*g*) *Hamer v. Giles*, 11 Ch. D. 492; *Warner v. Smith*, 9 Jur. N. S. 169. See, also, *Norton v. Russell*, 19 Eq. 343, where a surviving partner refused an account to the executor of his deceased copartner. See, as to mutual companies, *Harvey v. Beckwith*, 10 Jur. N. S. 577.

<sup>1</sup> See generally, as to costs, *Campbell v. Coquard*, 16 Mo. App. 552; *Godfrey v. White*, 43 Mich. 171; *Foulke v. Hitzeroth*, 14 Weekly Not. Cas. 241.

As to when the surviving partner is entitled to costs in a suit by distributees for an account, see *Sanderson v. Sanderson*, 17 Fla. 820; S. C. 20 Fla. 292.

The prevailing party, in a suit to recover from his copartner firm moneys unjustly withheld, and for an accounting, was held entitled also to recover costs in *Kimball v. Seal*, 92 Ind. 276.

So where, on dissolution, an account is rendered necessary by the fault of the defendant, he must pay the costs of the suit. *Carmichael v. Sharp*, 1 Ont. 381; S. C. 18 C. L. J. (N. S.) 263.

Although it appears from an account that nothing is due the plaintiff, yet if the defendant has unreasonably neglected to render

the plaintiff an account, the complaint should not be dismissed, but there should be a judgment adjusting the rights of the parties; and the court may, in its discretion, impose the costs upon the defendant. *Knapp v. Edwards*, 57 Wis. 191.

The question as to which of the parties has, by his conduct, caused the discord between them is never considered with a view to the adjustment of the costs of a settlement of their partnership affairs in court. *Stevens v. Yeatman*, 19 Md. 480.

In an action to liquidate a partnership all are plaintiffs and all defendants; and where the decree distributes anything between the partners the costs may be decreed against all, to be borne by them equally. *Pratt v. McHatton*, 11 La. Ann. 260.

(*r*) See the next note and *Butcher v. Pooler*, 24 Ch. D. 273. This rule was followed as to the whole costs where the action was referred under § 11 of the Com. Law Proc. Act, 1854. *Newton v. Taylor*, 19 Eq. 14.

(*s*) *Austin v. Jackson*, 11 Ch. D. 942, note; *Hamer v. Giles*, id. 942; *Potter v. Jackson*, 13 id. 845.

**Mode of taking the accounts.**<sup>1</sup>—The method of taking a partnership account under a judgment in the usual form is as follows:

1. Ascertain how the firm stands as regards non-partners.
2. Ascertain what each partner is entitled to charge in account with his copartners, remembering, in the words of Lord Hardwicke, that "each is entitled to be allowed as against the other everything he has advanced or brought in as a partnership transaction, and to charge the other in the account with what that other has not brought in, or has taken out more than he ought." (*t*)
3. Apportion between the partners all profits to be divided or losses to be made good, and ascertain what, if anything, each partner must pay to the others in order that all cross-claims may be settled.<sup>2</sup>

<sup>1</sup>The interests of the partners are, on final settlement, to be adjusted by the terms of the partnership agreement; but that has relation only to the period of dissolution or the appointment of a receiver, when the property passes into the custody of the officers of the court and the partners are ousted from control. *Lennig v. Lennig*, 11 Weekly N. Cas. 18.

Where a partnership account is ordered each partner is an actor, and, unless all the partners join in employing a competent accountant to make out a balance sheet with proper schedules, should be required to furnish his own statement of the account. *Myers v. Bennett*, 3 Lea (Tenn.), 184.

When a decree for an account between partners has been passed, all claims existing between them arising out of the partnership affairs, must be brought into the account for adjustment. *Holloway v. Turner*, 61 Md. 217.

For the settlement of all controversies between a surviving partner and the representatives and heirs of the deceased partner it is necessary to state the account between the surviving partner and the firm as well as between the deceased partner and the firm. *Anderson v. Beebe*, 22 Kan. 768.

(*t*) *West v. Skip*, 1 Ves. Sr. 242. The rule in *Clayton's Case*, respecting the appropriation of payments, applies to partners *inter se* as well as to other persons. See *Toulmin v. Copland*, 3 Y. & C. Ex. 625, and 7 Cl. & Fin. 350.

<sup>2</sup>The method of taking partnership accounts, above stated, is substantially followed in whole or in part in *Glover v. Albree*, 82 Ala. 324; *Neudecker v. Kohlberg*, 3 Daly, 407; *Lusk v. Graham*, 21 La. Ann. 159; *Chambers v. Crook*, 42 Ala. 171; *Collins v. Owens*, 34 Ala. 66; *Gaines v. Coney*, 51 Miss. 323; *Moore v. Wheeler*, 10 W. Va. 35; *Stevens v. Yeatman*, 19 Md.

480; *Schulte v. Anderson*, 13 Jones & Sp. 489. See, also, *Frigerio v. Crottes*, 20 La. Ann. 351; *Phelan v. Hutchinson*, Phill. Eq. 116; *Bullock v. Ashley*, 90 Ill. 102; *Ligare v. Peacock*, 109 Ill. 94; *Wells v. Babcock*, 56 Mich. 276; *Wells v. McGeoch*, 35 N. W. Rep. (Wis.) 769; *Wingarden v. Verhage*, id. (Mich.) 801.

In a statement of a partnership account involving items of debit or credit against or in favor of one or both of the partners, it is error to state the account in debtor and creditor form as between the partners individually; the account of each partner with the firm should first be stated and then the account between the partners individually on the basis of that result, one-half of the indebtedness of either to the firm being the amount of his indebtedness to the other; and the individual debts paid by one for the other should be charged in the individual account. *Garrett v. Robinson*, 80 Ala. 192. See, also, *Glover v. Albree*, 82 Ala. 324.

Proof that all the profits have not been collected is no bar to a bill for an account. *Kimball v. Seal*, 92 Ind. 276.

In stating an account between partners a referee should ascertain what the real and actual profits were, and not what they ought to be or might have been. *Boire v. McGuin*, 8 Or. 466.

An accounting between copartners is to be governed by the special provisions of the copartnership agreement. *Neudecker v. Kohlberg*, 3 Daly, 407; *Pearce v. Pearce*, 77 Ill. 284. And the right to return of capital invested by each partner is only to be destroyed by express

stipulation to the contrary. Unless waived or extinguished by express agreement the return of capital or of other means furnished by each party for use and employment in the business for their mutual advantage, although a debt of a secondary character, is, as between them, an obligation of the partnership, which should be discharged before any final distribution of the profits. *Neudecker v. Kohlberg*, *supra*.

Thus where, by a copartnership agreement, R. was to furnish "capital" and M. "skill and knowledge of business," all gain and increase to be equally divided on the termination of the partnership, it was held that, on dissolution, R. was a creditor to the extent of his capital, and M. only entitled to half the gain, if any. *Rowland v. Miller*, 7 Phil. 362.

Partnership accounts should be so stated, where one partner has had entire charge of the business, that he will be debited with the whole capital placed in his hands as well as with the proceeds of sales realized by him. And where part of the capital was composed of stock, which has been used in the business or disposed of, and the proceeds charged against him, he should be credited with such stock as a disbursement to the amount at which it was originally charged against him. *Gunnell v. Bird*, 10 Wall. 304.

Where one partner puts into the firm simply the use of machinery, and another a patent-right, and another advances money to put the business in operation, and agrees to convey land, on bill for an accounting and for a sale of the prop-

erty each party should be allowed for all money advanced a fair and reasonable rent for his property employed up to the time of filing the bill, and for labor performed by each during that period, and the balance struck accordingly. It is error to allow a certain per cent. for the use of machinery. It should be the fair value of its use as situated, and not what it might have been worth if used at some other place. *Flagg v. Stowe*, 85 Ill. 164.

One partner of a dissolved firm who takes the stock and undertakes to settle one branch of the business, and without an appraisal carries on the business for his own benefit, should be charged with what the stock was fairly worth at the time of the dissolution and not with the amount realized by him three years thereafter. *Hay's Appeal*, 91 Pa. St. 265. See, also, *Weldon v. Beckel*, 10 Daly, 472.

Where a partner uses the machinery of a firm after dissolution a presumption arises that he has purchased the same, and upon an accounting he will be charged with its value. *Barclay's Appeal*, 8 Atl. R. 169.

A partner collecting firm moneys and making no entry thereof in the firm books is properly chargeable with the amount thereof if ascertainable. *Evans v. Montgomery*, 50 Ia. 325.

The plaintiff and defendant, being partners in the lumbering business, the former conveyed to the latter the undivided one-half of a lot of land which he had bought for a trifling sum at a tax sale, upon an agreement that the defendant should let him have \$800 for one year without interest and

furnish money to carry on the partnership business. From this land the parties as a firm took a large quantity of lumber. In an action for an accounting between the parties the referee found that the land was worth \$1,000, and he credited the plaintiff that amount. *Held*, that the referee erred in giving such credit; the proof showing that the land had cost the plaintiff only a trifle, and that he was willing to put it into the firm upon the terms stated. *Held, also*, that the amount reported by the referee as due from the defendant being \$2,023.22, there should be deducted from that sum the one-half of \$1,000, the value of the whole land, less the interest for one year on \$800, viz., \$56, leaving a balance of \$1,579.22 due the plaintiff. *Leonard v. Martin*, 52 Barb. 113.

Where, in an action of account between copartners, the auditors allowed to the defendant the sum of \$2,236.42, which was the full amount of a note advanced by him as a part of the capital of the firm, it was *held* that such report ought not to be set aside, because the defendant, in an action of account previously brought by him against the present plaintiff, had alleged that he had advanced as capital to said copartnership \$2,000, and had not at any time before the hearing claimed that he had advanced a greater sum. *Day v. Lockwood*, 24 Conn. 185.

Upon an accounting between partners each should pay his share of debts contracted and paid on account of the firm. *Beeson's Appeal*, 3 Cent. R. 539; S. C. 2 Atl. R. 683.

A partner who has paid a firm

debt is not entitled to subrogation against his copartner until an account has been settled between them. *Fessler v. Hickernell*, 82 Pa. St. 150.

The complaint in an action to dissolve a partnership and settle the accounts averred a loss, borne exclusively by the plaintiff, and asked for judgment for defendant's proportion; and the evidence showed a profit realized by plaintiff in one transaction as well as a loss borne by him in another. *Held*, that the account taken should credit the defendant with his part of the profits realized as well as charge him with his proportion of the loss sustained. *Clark v. Gridley*, 41 Cal. 119.

If one partner, being indebted to his copartner, discharges the debt by paying a debt of equal amount due from his copartner to a third person, but makes the payment with money or property belonging to the partnership, he can only claim, on settlement of the partnership accounts, a credit for one-half of the amount paid. *Wolff v. Shelton*, 51 Ala. 425.

A., a merchant, being largely indebted, took B. as a partner, who brought in no capital, but who succeeded in establishing the credit of the firm, and the partnership business produced immense profits. It was agreed that the debts of A. should be undertaken by the firm. The firm failed and A. died. One of the debts of A. was \$800,000 to the United States, which was compromised on the payment of \$200,000. The remaining debts of A. were paid and compromised by the firm. *Held*, that A. became a creditor to the firm to the amount

of A.'s debts paid and compromised by the firm, but only to the amount at which they were compromised, and that as the partnership property, after the payment of the partnership debts, belonged to the partners, B. was to be credited with the amount of A.'s debts as they were compromised. *Iddings v. Bruen*, 4 Sandf. Ch. 223.

Where a retiring partner has sold his interest to the others, received payment for the greater part, and accepted the managing partner as his exclusive debtor for the balance, the latter is entitled to nothing more than such credit as would follow the payment of an ordinary debt of the new concern. One rule must govern the charging of each member's account with the firm unless there is a special agreement to the contrary. *Chandler v. Sherman*, 16 Fla. 99.

Where, in an accounting between partners, it appears that one of them, during the continuance of the partnership, had immediate charge and control of the firm's book of account, and the exclusive management of its finances, and the custody and control of its money, and the moneys received in the firm business exceed the moneys disbursed in such business, and it does not appear that the excess was applied to the use of the firm and for its benefit, such excess is presumed to remain in the hands of the partner so having the control and custody of the firm money, and he is properly chargeable therewith in the accounting. *Johnson v. Garrett*, 23 Minn. 565.

A partner sued his two copartners for a final accounting and settlement of the copartnership affairs,

and it appeared that the two partners sued had previously received jointly \$1,281 more than they were entitled to, and the plaintiff \$1,281 less than he was entitled to. While the action was pending the plaintiff settled with and discharged from all further liability one of the defendants. *Held*, that the judgment in favor of the plaintiff and against the other defendant should be for one-half of \$1,281, to wit, \$640.50. *Lord v. Anderson*, 16 Kan. 185.

Where cattle were bought by the complainant and defendant as partners or on joint account with \$1,100, furnished by the complainant, \$1,000 of which was money belonging to a prior firm of complainant, defendant and a third person, and \$100 of complainant's own money, and the third person disclaimed being interested in the purchase or the money used, whose answer was found to be true, and it appeared that the cattle had been sold at a profit of \$120, a decree on bill for an account against the defendant, who received the entire proceeds, giving him one-third of the \$1,000 capital, and giving the balance to the complainant, was held proper as adopting the correct basis for stating the account as to the sum invested. *Bullock v. Ashley*, 90 Ill. 102.

If part of the members of a former copartnership sell the part or share of another partner without his consent, they must account to him, not at the value fixed by themselves, but at the real value. *Phillips v. Reeder*, 18 N. J. Eq. 95.

When the partners invest unequal amounts in the capital stock of the firm, and one of their arti-

cles provides that all profits and losses shall be shared equally, and another provides that at the close of the partnership the assets and property shall be divided between them in the proportion of their investments, in such final distribution all losses will be first considered and equalized, though no profits or losses have been adjusted or declared during the copartnership. *Raymond v. Putnam*, 44 N. H. 160.

In making a final settlement and division of partnership property the court will look into the peculiar circumstances; and where there is real estate which has been improved by one partner individually, he will, if possible, be allowed for his improvements, and on a partition of the real estate will be allowed to retain the improved portion. *Cooper v. Frederick*, 4 G. Greene, 403.

On a bill by the representatives of a deceased partner against surviving partners for an account, the surviving partners should not be charged with the value of the partnership assets at the exact date of the deceased partner's death, but only with such sum as, by the use of reasonable diligence, they might have obtained for them in closing the partnership business. Nor should they be charged with the value of real estate of the partnership, the title to which is left by the decree in the heirs of the deceased partner. *Moore v. Huntington*, 17 Wall. 417.

In stating an account between an executor and the surviving partner of the testator it is not error to charge the surviving partner with the value of a note due the tes-

**Matters involved in taking the account.**—In order, therefore, to take a partnership account, it is necessary to distinguish joint from separate estate, joint debts from separate debts,<sup>1</sup> and to determine what gains and what losses are to be placed to the joint account of all the partners, or to the separate accounts of some or one of them exclusively. The principles upon which this is to be done have been explained in previous chapters. Referring the reader, therefore, to them, and reminding him that in taking accounts between partners attention must be paid, not only to the terms of the partnership articles, but also to the manner in which they have been acted upon by the partners, (*u*)

tator of the plaintiff individually, if such note arose from, or grew out of, the business of the copartnership. *Royster v. Johnson*, 73 N. C. 474.

A surviving partner can claim only one-half the balance due the firm by a deceased partner, as the remaining half was at his death due to himself. *McCormick's Appeal*, 55 Pa. St. 252.

Where a partner having charge of the business and keeping the books of the firm refuses to account and show what the profits were, it is proper, in stating the account, to decree the payment of the capital advanced by his copartner, with interest thereon, the latter being willing to accept that. If the profits were less than the interest the defendant should have rendered an account showing such fact. *Pearce v. Pearce*, 77 Ill. 284.

<sup>1</sup> On the filing of a bill in chancery for the settlement of partnership accounts the parties cannot introduce their individual accounts into the statement. *Hanks v. Baber*, 53 Ill. 292.

Where one partner assumes the debt of another partner to the firm, and the latter actually pays the debt to the former, and in a settlement of their private accounts the partner so assuming to pay fails to account to the firm, the remedy of the original debtor partner would seem to be against the estate of the delinquent partner and not against the firm or the other partner. *McCall v. Moss*, 112 Ill. 493.

As to the apportionment of rent and manner of collecting the same, where one partner makes a lease of premises to the firm of which he is a member, see *Allen v. Anderson*, 13 Bradw. 451.

(*u*) See *ante*, pp. 408, 432, and *Watney v. Wells*, 2 Ch. 250. It is said a partner is not to be charged as such with what he might have received without his wilful default. *Rowe v. Wood*, 2 J. & W. 556. But *quere* whether a surviving partner could not be made so to account, as he alone can get in the assets of the firm. See, also, *Bury v. Allen*, 1 Coll. 604.



there re\*main\* but little to add on the present sub- [\*519] ject, except as regards just allowances, the period over which the account is to extend, and the evidence upon which it is to be taken.

*With respect to just allowances.*

**Just allowances.**—Just allowances are made although the judgment is silent as to them; (*x*) and when a partnership account is ordered it is not usual for the court to determine beforehand what are, and what are not, just allowances. That is determined on taking the account; and, if necessary, the order will direct the chief clerk to state the facts and reasons upon which he shall adjudge any allowances to be just allowances. (*y*) What ought to be so allowed must be determined by the articles of partnership, and by the principles discussed in a preceding chapter. (*z*)

*With respect to the period over which an account is to extend.*

This can only be determined by ascertaining (1) the time from which it is to begin, and (2) the time at which it is to cease.

**1. Time from which the account is to be taken.**—The time from which the account is to begin will, in a general account of partnership dealings and transactions, be the commencement of the partnership, unless some account has since that time been settled by the partners, in which case the last settled account will be the point of departure. (*a*) If there has been an account settled so as to be binding on the parties such account will not be re-opened. (*b*) This

(*x*) See Ord. xxxiii, r. 8.

(*y*) See *Crawshay v. Collins*, 2 Russ. 347; *Brown v. De Tastet*, Jac. 294, 298 and 299; *Cook v. Collingridge*, Jac. 623, 625; *Wedderburn v. Wedderburn*, 2 Keen, 753.

(*z*) *Ante*, p. 380 *et seq.*

(*a*) See *Cook v. Collingridge*, Jac. 624; *Beak v. Beak*, Rep. Temp.

Finch. 190. An incoming partner has no right to profits made before he became a partner unless there is an agreement to that effect. *Gordon v. Rutherford*, T. & R. 373. See, as to the statute of limitations, *ante*, p. 508 *et seq.*

(*b*) See *ante*, p. 512.

used to be provided for in the decree by the insertion of the clause, "And if, in taking the said account, it shall [\*520] appear that any \*account has been settled and agreed upon between the parties up to any given time, the same is not to be disturbed. (c)<sup>1</sup> It is not, however, now usual to insert these words, it not being the practice to disturb settled accounts unless there is some special direction to that effect. (d)

**Dealings anterior to commencement of partnership.**—

Where partners have had dealings together preparatory to the commencement of their partnership, these dealings cannot be excluded from consideration in taking the partnership accounts. As observed by Lord Langdale in *Cruikshank v. Mc Vicar*: (e)

"Some things must be done by way of preparation for or introduction to the real transactions of the partnership business. Again, when the partnership business is, in one sense, at an end, still you have not therefore put an end to the joint transactions; they must necessarily be carried on for the purpose of winding up the concern and everything belonging to it. So that when you speak of partnership dealings and transactions you are not to exclude from your consideration those transactions and matters which are necessary by way of introduction or prep-

(c) Seton, 276, ed. 2.

<sup>1</sup> On a bill to settle a partnership in a land speculation and state the account, where the parties have had a previous settlement, the court will adopt such settlement as the basis upon which to adjust the subsequent dealings. *Colehour v. Coolbaugh*, 81 Ill. 29.

Neither party to a suit for a partnership account can be made to submit to an overhauling of his account for any period not within the issue. *Candler v. Stange*, 53 Mich. 479.

No allowance should be made in a partnership accounting for matters antedating the partnership even though relevant as evidence. *Wells v. Babcock*, 56 Mich. 276.

A partner is not entitled to relief in equity to compel an accounting with his copartner concerning a certain part only of the partnership business, where the same is not a separate business, but simply one of the particular parts of the whole business, and no account is sought as to the whole. *Davis v. Davis*, 60 Miss. 615.

Items accruing since suit of account commenced included in the account in *Roberts v. Eldred*, 15 Pac. Rep. (Cal.) 16.

(d) See *Holgate v. Shutt*, 27 Ch. D. 111, and 28 id. 111; *Newen v. Wetten*, 31 Beav. 315. Compare *Milford v. Milford*, MacCl. & Y. 150.

(e) 8 Beav. 116.

aration for a partnership dealing, nor are you to exclude those which afterwards follow for the purpose of winding up the concerns of the partnership."

**2. Time up to which the account is to be taken.**—The time at which an account of partnership dealings and transactions is to stop will, naturally, be the date of the dissolution of the firm. (*f*) Not that no account is to be taken of what occurs after that date; for some time or other must elapse between the dissolution and the final winding up of the affairs of the concern, and such time cannot in fairness to any one be excluded from consideration. (*g*) Notwithstanding dissolution, a partnership is deemed to continue so far as may be necessary for the winding up of its affairs; (*h*) and an account of partnership dealings and transactions, although in one sense it stops at the date at which the partnership is dissolved, must still be kept open for the purpose of debiting and crediting the proper \*par- [\*521] ties with the moneys payable by or to them in respect of fresh transactions incidental to the winding up as well as in respect of old transactions engaged in prior to the dissolution. (*i*)

**Subsequent profits when a dead or retired partner's capital has been left in the concern.**—Moreover, upon the retirement, bankruptcy or death of a partner, it often happens that the continuing or surviving partner carries on the partnership business without coming to any settlement of the partnership accounts, and without paying out the share of the late partner. When this is done questions of great difficulty arise which it is now proposed to investigate.

(*f*) See, accordingly, *Beak v. Beak*, Finch. 191, a case of dissolution by death; *Jones v. Noy*, 2 M. & K. 125, a case of dissolution by decree on the ground of lunacy.

(*g*) See *per* Lord Eldon in *Crawshay v. Collins*, 2 Russ. 345; *Hale v. Hale*, 4 Beav. 375.

(*h*) See, as to this, *ante*, p. 217 *et seq.*

(*i*) See *Willett v. Blanford*, 1 Ha. 270; and as to the difference between the accounts before and after the date of dissolution, see *Watney v. Wells*, 2 Ch. 250. See, also, *Booth v. Parks*, 1 Moll. 465, *ante*, pp. 402, 420.

*Account of profits subsequent to dissolution.*

**General principles.**—Before adverting to the decisions which define and illustrate the right of a late partner, or of his representatives, to an account of the profits made by his continuing or surviving partners by the use of his capital in their business, it will be useful to consider the principles applicable to a more abstract question, which may be put thus: If a person trades with property which does not belong to him, what are the rights of the owner against him in respect of the profit he has made?

**Where capital is lent at interest.**—First let us suppose that the property is used in trade by agreement with the owner; then the agreement will regulate the rights of the owner. Consequently, if a partner agrees that when he dies or retires his capital shall remain in the business at interest, those who carry on that business will be accountable for the capital and interest and nothing more. (*k*) Further, if executors or trustees lend trust money to a stranger at interest, the obligation of the borrower is limited to repayment of the money lent with interest, and it is immaterial whether he has employed the money in trade or not, and whether the money was lent to him properly or im-  
[\*522] properly. (*l*) \*But a loan by A. to B. must not be confounded with capital brought by A. into a firm of A. & B. (*m*)

**Where capital is wrongfully employed in trade by persons who are not trustees.**—Next, let us suppose that the property is wrongfully used in trade without any agreement, express or tacit, with the owner; and let us suppose that there is no trust between the trader and the owner. The trader's liability in this case will be to restore the property and to make to the owner proper compensation

(*k*) *Vyse v. Foster*, L. R. 7 H. L. 130, approved in *Vyse v. Foster*, 8 318, and 8 Ch. 309, where one of Ch. 309, *infra*, p. 534.  
the surviving partners was an executor of the deceased. (*m*) See *Travis v. Milne*, 9 Ha. 141, and *Flockton v. Bunning*, 8

(*l*) See *Stroud v. Gwyer*, 28 Beav. Ch. 323, note *infra*, p. 530.

for its detention. But what is proper compensation? Is it interest or the profits made by the trader by the use of the property in question? or the profits which the owner would (probably) have made if he had had the property itself? The profits which the owner might have made can only be guessed at, and this is a sufficient reason for rejecting these profits as a measure of compensation. On the other hand, to limit the compensation to interest at the accustomed rate would frequently enable the wrong-doer to profit by his own wrong and be an inadequate compensation to the owner. It may therefore be necessary to give the owner the profits made by the trader by the use of the property in question after making the trader all just allowances, including a fair remuneration for his trouble. To do so may, moreover, be justified upon the ground that the profits are accretions to the property which has yielded them, and ought to belong to the owner of such property, in accordance with the maxim *accessorium sequitur suum principale*. (n) At the same time it may not be always right to restrict the owner's compensation to the profits made by the use of his property, for it may happen that it has made no profit, or less profit than interest at the current rate. (o) Compensation to the owner being the object in view, it would be only fair to give him<sup>1</sup> the option to take interest or the profits made by the use of his property. (p)<sup>1</sup>

(n) See *Yates v. Finn*, 13 Ch. D. 839; Sir Sam. Romilly's argument in 15 Ves. 224; Sir T. Plumer in 1 Jac. & W. 132 and 133. See, also, *per Romilly, M. R.*, in 15 Beav. 392, and 22 Beav. 100.

(o) As in *Booth v. Parkes, Beatty*, 444.

(p) See acc. *infra*, p. 528. But he cannot have both. See *Heathcote v. Hulme*, 1 Jac. & W. 122. See *Birnie v. Vandever*, 16 Ark. 616.

<sup>1</sup> Where a guardian puts his

ward's funds into the business of a firm of which he is a member and dies, leaving such funds among the partnership assets, and the surviving partner with notice continues such assets in the business and subsequently becomes insolvent, a bill may be maintained to recover the same, especially when not only the firm, but also the securities on the guardian's bond, are insolvent. In such case the law fixes a lien on the estate of the deceased partner of higher

**Where capital is wrongfully employed in trade by a trustee.**—Now let us suppose that the trader is a [\*523] trustee of the prop<sup>erty</sup>, and that he employs it in trade contrary to his trust. The reason for charg-

dignity than any claim of creditors. *Carter v. Lipsey*, 70 Ga. 417.

Where the administrator of a deceased partner, who was also the guardian of the beneficiaries of such partner, in good faith allowed the business to be continued by the surviving partners for several years without account, and the property increased in value, and was then by special law transferred to a corporation created for that purpose, and the beneficiaries for more than seven years after coming of age received dividends of their share of stock and annual stated accounts, *held*, that by reason of such acquiescence they could not sustain a bill for an account of the estate. *Hoyt v. Sprague*, 103 U. S. 613.

Where one partner, after the dissolution, remains in possession of the partnership property, and continues to manufacture and sell upon his own account, he will be required to account to the firm for a reasonable rent of the property after deducting repairs, taxes paid and necessary expenses in its preservation; and if he appropriates firm property to his own use he must account for it at a fair cash value. *Ligare v. Peacock*, 109 Ill. 94.

If, after the termination of a firm in any manner, business is continued by a portion of the associates with the firm capital or appliances, all profits thereby made are part of the joint estate, and

must be accounted for. *Fithian v. Jones*, 12 Phila. 201.

Where the surviving partner continued to use the capital of the deceased partner, the latter's representative may demand interest on the capital used and profits earned by its use. *Robinson v. Simmons*, 5 N. Eng. Rep. (Mass.) 743.

But where the surviving partner paid the representatives nearly all of the capital to which they were entitled, and litigation arose in reference to the balance, for which the representatives were largely responsible, the surviving partner should not be compelled to pay profits attributable to their nominal capital in business subsequent to payment, but interest thereon was all that was equitably called for. *Robinson v. Simmons*, 5 N. Eng. Rep. (Mass.) 743.

The party continuing the use of the partnership property may be required to account for such use, although it was only a partnership in proceeds and not in the stock. *Pine v. Ormsbee*, 2 Abb. Pr. N. S. 375.

A partner who has expelled his copartner, and, under the permission of the chancellor, carried on the business, retaining the stock and assets in preference to having a sale and division, must render an account, and pay to his copartner his share of the profits. *Shiddell v. Messick*, 4 B. Mon. 157.

Where a partnership consists of three persons, and the whole capi-

ing him with interest, or the profits made by the property, at the option of its owner, are as applicable to this case as to

tal is furnished by two, and these two have a right to dissolve the partnership, and do dissolve it, and transfer the whole stock to a new partnership and business, the other partner, he being indebted to the firm to a greater amount than his share of the profits, cannot follow the old capital stock into the new concern and claim a share of the profits. *Hyde v. Easter*, 4 Md. Ch. 80.

After the dissolution of a partnership between attorneys-at-law each partner is entitled to share in the fees collected for the unfinished business of the firm. *Osment v. McElrath*, 68 Cal. 466.

Where, after the dissolution of a firm between plaintiff and defendant, under an agreement by which the firm business was to be settled by defendant, plaintiff induced parties who had contracted to sell the firm lumber, of which some portions had been delivered and in part paid for before the dissolution, to repudiate the contract and deliver to him upon a contract with him individually the residue of the lumber specified, *held*, that he must account to the defendant for the share of the latter in the profits of the transaction. *Tolan v. Carr*, 12 Daly, 520.

Though it is a general rule that when, upon a dissolution of a partnership, the continuing partner carries on the business with partnership stock he is liable to the outgoing partner for his full share of the profits, yet this rule does not apply where, at the date of the dissolution, the outgoing partner

has drawn his capital, and has no property in the concern, but is indebted to it. *Taylor v. Hutchison*, 25 Gratt. 536.

The rights of parties in relation to the rents and profits of property which had belonged to a partnership, but which had accrued intermediate to the entry of a decree of dissolution in the lower court and the decision of an appeal to the supreme court, must be determined in the same manner and by the same rule by which they would have been determined had they accrued prior to the decree of dissolution. *Clark v. Jones*, 50 Cal. 425.

If, upon the dissolution of a partnership, it is agreed that the partners who remain shall take the property and close up the business of the firm, and a final settlement between the outgoing and remaining partners is postponed until the adjustment of the outstanding accounts, and the remaining partners subsequently receive upon a particular adventure of the firm an advance which proves to be more than is realized from the adventure, and do not repay the excess, such advance is to be treated, in a suit in equity against the outgoing partner for a settlement, as having been made for the benefit of all the partners. *Tyng v. Thayer*, 8 Allen, 391.

In the case of a partnership in a commission and warehouse business, where one partner engages to furnish the buildings and the other to superintend the business, if the latter partner dies his estate will

that last investigated; but there is in this case an additional reason for so charging him, for it is a well-established rule that no trustee shall himself derive profit from the use of the trust property. (*q*)

**Mixed cases — Constructive trusts.**—There remains for consideration the mixed and difficult case in which a trustee has improperly employed the trust property in a trade carried on by himself in partnership with others who are not trustees.

*a. Liability of the trustee sharing profits.*—The liability of the trustee in this case to be charged (at the option of the *cestui que trust*) with interest or with the profits which he (the trustee) has derived from the use of the trust property is well established; (*r*) but it has sometimes been considered that he ought to be charged with all the profits made by the firm by means of the trust property. This view is apparently based upon the ground that the profits are accretions to the trust property; and that the trustee is as much liable for them as for the property itself; and that he is not discharged from this liability by the circumstance that he has divided the profits with his copartners. But, plausible as this view is, it must be remembered that in the case now supposed the profits have not all been earned or received by the trustee, but by himself and others, and that he is not in a position to make them refund their shares of the profits yielded by the trust property. It would therefore be highly unjust to make the trustee accountable for more than his own share of such profits; and this view has

be entitled to share in profits from storage. *Parnell v. Robinson*, 58 Ga. 26.

the storage of cotton stored in his life-time, though not realized by the disposal of the cotton till after his death, after deducting the actual expense of the delivery of the cotton to the bailors, or of its sale, including the keeping of the accounts thereof; also to share in any proceeds realized by sale of unclaimed cotton remaining on

(*q*) See, as to the liability of the trustee, *Docker v. Somes*, 2 M. & K. 655.

(*r*) See *Jones v. Foxall*, 15 Beav. 388, where the trustee was charged with compound interest at five per cent. See Lord Selborne's observations on this case in *Vyse v. Foster*, L. R. 7 H. L. 346.



been adopted by the courts of appeal both in England and Scotland. (s)

\*b. **Liability of trustee not sharing profits.**—The [\*524] same considerations lead to the conclusion that a co-trustee who is not himself a member of the firm deriving profit from the use of the trust money, and who consequently does not himself derive any profit from that use, is not accountable for any of the profits yielded by the trust property. (t)

c. **Liability of partners who are not trustees.**—Lastly, we have to consider the position of the partners who are not trustees, but who have shared the profits derived from the use of the trust property. With respect to them the first thing to ascertain is whether they are personally implicated in any breach of trust; for if not, they are under no liability in respect of the profits in question—indeed, they may not even be liable to make good the trust money. (u) But if they have traded with the trust money, knowing that its employment in trade was a breach of trust, they incur the same liabilities in respect of it as if they were themselves trustees. Consequently they become jointly and severally liable as well for the trust property itself as for the profits which they have made by it. (x) But this liability cannot be enforced except in an action to which they are all parties. (y) It has, indeed, been doubted

(s) See *Vyse v. Foster*, L. R. 7 H. L. 318, and 8 Ch. 309; *Laird v. Chisholm*, 30 Scottish Jur. 582. In both of these cases the trustees only were sued. See, also, *Jones v. Foxall*, 15 Beav. 388, p. 395; *Palmer v. Mitchell*, 2 M. & K. 672. Whether the case would be different if all the other partners were parties is doubtful. See *Vyse v. Foster*, *ubi supra*. See a thoughtful article on this subject in *The Law Quarterly Review*, 1887, p. 211.

(t) See *Vyse v. Foster*, *infra*, p. 534.

(u) *Ante*, p. 160.

(x) See, accordingly, *Flockton v. Bunning*, 8 Ch. 323, note, *infra*, p. 530.

(y) See *Vyse v. Foster*, and *Laird v. Chisholm*, *ubi supra*; *Simpson v. Chapman*, 4 De G. M. & G. 174, *per* Turner, L. J. Compare *Brown v. De Tastet*, Jac. 284; *MacDonald v. Richardson*, 1 Giff. 81; *Bowes v. City of Toronto*, 11 Moore, P. C. 463.

whether there is any joint and several liability as regards profits, and whether the non-trustee partners are liable for more than the trust property and interest. (2)

**Practical difficulty in carrying out the foregoing principles.**— Assuming that a person is entitled to an account of profits made by the use of his property in trade, it is obviously often extremely difficult to ascertain these profits. To take the ordinary case of surviving partners continuing to trade with the capital of a deceased partner, great difficulty will be found in arriving at the share of profits to which the executors of the deceased are entitled.

It is very easy to say they can be calculated by the rule of three,— as the whole capital is to the whole profits, [525] so is the late partner's share in the capital to his share of the profits,— but this assumes that the profits in question have been made by capital only.<sup>1</sup> Profits, and very large profits, may be made by skill and an extensive connection with little or no capital; and even if there be capital, the profits may be attributable less to it than to other matters, and it may be impossible to determine with any precision the extent to which the capital has contributed to the realization of the profits obtained. (a) Special inquiries on this subject, therefore, are almost always necessary; and if it can be shown that, having regard to the nature of the business or other circumstances, the profits which have been made cannot be justly attributed to the

(2) See *Vyse v. Foster*, *infra*, p. 534; *Stroud v. Gwyer*, 28 Beav. 130; *Macdonald v. Richardson*, 1 Giff. 88. But in *Flockton v. Bunning*, 8 Ch. 323, note, *infra*, p. 539, the liability was treated as perfectly clear.

<sup>1</sup> If a court of equity fix upon an antecedent time at which a partnership shall be considered as having determined, and it appear that the capital of one partner was sub-

sequently employed by another, who continued to carry on the business, the former is entitled to such a proportion of the profits as his capital thus retained bears to the whole capital. *Durbin v. Barber*, 14 Ohio, 311.

(a) This difficulty was felt very strongly in *Featherstonhaugh v. Turner*, 25 Beav. 382, noticed *infra*, p. 536.

use of the capital or assets of the late partner, his *prima facie* right to share such profits will be effectually rebutted.

The extent of the liability to account for subsequent profits was elaborately discussed by the late Vice-Chancellor Wigram in *Willett v. Blanford*, (b) and the conclusion arrived at by him was that no general rule could be laid down upon the subject, and that every case must depend on its own circumstances. "The nature of the trade, the manner of carrying it on, the capital employed, the state of the account between the late partnership and the deceased partner at the time of his death, and the conduct of the parties after his death, may materially affect the rights of the parties." This conclusion of the vice-chancellor was entirely in accordance with previous decisions, (c) and has been approved by subsequent judges; and in conformity therewith several cases have since been decided, in which profits acquired after the death of a partner were held to belong wholly to those by whose labor they had been made. An element of uncertainty is thus introduced into an already difficult and complicated branch of law, and renders it extremely embarrassing; but it is hoped that the foregoing attempt to explain its principles may tend to introduce more certainty in their future application.

\*Passing now to the decisions, to which the fore- [\*526] going observations are intended to serve as an introduction, the right to an account of profits subsequent to a dissolution will be found distinctly laid down in the following cases:

The first case of importance on the subject is *Crawshay v. Collins*. (d) There one partner had become bankrupt,

(b) 1 Ha. 353.

(c) See, in particular, Lord Eldon's observations on *Crawshay v. Collins*, in Jac. pp. 622 and 297, and 2 Russ. 330.

(d) 15 Ves. 218; 1 J. & W. 267; and 2 Russ. 325. The decision in 15 Ves. 218, was afterwards said by

Lord Eldon not to have gone to the extent ordinarily supposed. See Jac. 296 and 622, and 2 Russ. 330. *Brown v. Vidler*, cited in 15 Ves. 223, and 2 Russ. 340, is an earlier case in point. See, too, *Brown v. Litton*, 1 P. W. 141, and 10 Mod. 20; *Hammond v. Douglas*, 5 Ves. 539.

and the solvent partners had carried on the business without paying out the bankrupt's share of the assets, and an inquiry was directed with a view to ascertain whether profits made subsequently to the bankruptcy were made by the application of the funds which then constituted the capital of the concern, (e) or by the application of any other, and what funds; and the master was directed to distinguish between capital and stock in trade. (f) The object of this inquiry was to ascertain whether the profits made after the dissolution were actually made by the application of the funds that belonged to the bankrupt as a member of the partnership. (g) And it appearing that such profits were made, it was held by Lord Eldon, and afterwards by Lord Lyndhurst, on a rehearing, that the assignees had a right to a share of these profits, and that the account could not stop until the claims of the assignees were satisfied. The bankrupt was originally entitled to three-eighths of the partnership assets, and although he was indebted to the firm so that the sum actually payable to him was less than three-eighths of the net assets of the firm, and although the continuing partners had brought in a large additional capital since the bankruptcy, still the assignees were held entitled to be credited throughout with three-eighths of the profits, being debited with what the bankrupt owed. The decree in this important case declared that the three eighth parts or shares of the bankrupt in the partnership ought to be considered as continuing notwithstanding, and after, [\*527] his bankruptcy; and \*that the assignees were entitled to three eighth parts of the profits which had been already reported to have been made; and three eighth parts of such further profits as (on taking the further accounts thereby directed) should appear to have been made. (h)

**Death.**—So, in *Brown v. Tastet*, (i) where one partner died, and the survivor carried on the partnership business

(e) 15 Ves. 218.

(h) 2 Russ. 347.

(f) 1 J. &amp; W. 267.

(i) Jac. 284. It is said in 2 M. &amp;

(g) 2 Russ. 337.

K. 658, that this case was affirmed

without accounting for the share of the deceased to his administratrix, an account was directed at the suit of the administratrix, not only of the dealings and transactions of the partners up to the death of the deceased partner, but also of the property of the deceased in the hands of the surviving partner, and of all profits and gains made by him by means of such property.

*Yates v. Finn* (*k*) is another case of the same sort; and there the surviving partner was decreed to account for the profits made by means of the capital of the deceased partner, but was allowed a proper sum for managing the business.

**Other instances.**—The rule established in these cases has been applied in a variety of instances; *e. g.*, where a managing partner had continued the business after the period fixed for the dissolution and winding up of the partnership; (*l*) where a partner had become lunatic and the firm had been dissolved, but the business had been continued by the other partners, and they had not paid out the capital of the lunatic partner; (*m*) where partners had agreed to dissolve and to have the partnership business wound up, and its assets got in and converted by a third person, and one of the partners, nevertheless, carried on the business in the meantime for his own benefit; (*n*) where a mining partnership had been dissolved, but one of the partners had obtained a renewed lease of the mine and had continued to work it for his own benefit. (*o*)

**\*Option to take interest or profits.**—In the foregoing cases it will be observed there was no relation

by the house of lords, and after all to have been abandoned by the plaintiff, who found it impossible to work out the decree. See, too, *Featherstonhaugh v. Turner*, 25 Beav. 382; *Smith v. Everitt*, 27 id. 446; *Booth v. Parks*, 1 Moll. 465, and *Beatty*, 444.

(*k*) 13 Ch. D. 839.

(*l*) *Parsons v. Hayward*, 31 Beav. 199; affirmed on appeal, 4 De G. F. & J. 474.

(*m*) *Mellersh v. Keen*, 27 Beav. 236.

(*n*) *Turner v. Major*, 3 Giff. 442.

(*o*) *Featherstonhaugh v. Fenwick*, 17 Ves. 298. See, too, *Clements v. Hall*, 2 De G. & J. 173.

of trustee and *cestui que trust* (as distinguished from that of late partnership) subsisting between the persons who made the profits and those who were held entitled to share them. But even where there is no true relation of trustee and *cestui que trust*, partners continuing to carry on business without coming to an account with their late partner, or those who represent him, are liable to be charged either with the profits made by the use of his capital or with interest on it at 5*l.* per cent., at the option of those to whom such capital belongs; (*p*) but in taking an account of subsequent profits the partner by whose exertions they have been made is usually allowed compensation for his trouble, (*q*) unless he is, in the proper sense of the word, a trustee and guilty of a breach of trust, when no such compensation is allowed. (*r*)

**Account of subsequent profits against executors who are surviving partners.**—The rights of the legatees and next of kin of a deceased partner against his executors, where they are themselves surviving partners or have themselves become partners since his death, are illustrated by the following decisions:

In *Cook v. Collingridge*, (*s*) the executors of a deceased partner sold their testator's share to the surviving partners, who resold it to one of the executors. The sale was set aside at the instance of a legatee, and an account of profits made subsequently to the death of the deceased partner was decreed, although the money paid for the testator's share was not continued in the business.

(*p*) *Booth v. Parks*, 1 Moll. 465, and Beatty, 444. See, also, *Clements v. Hall*, 2 De G. & J. 186; *Toulmin v. Copland*, 2 Ph. 711, reversing S. C. 4 Ha. 41.

(*q*) *Yates v. Finn*, 13 Ch. D. 839; *Brown v. De Tastet*, Jac. 284. See, also, *id.* 623; *Featherstonhaugh v. Turner*, 25 Beav. 382; *Mellersh v. Keen*, 27 *id.* 242.

(*r*) *Stocken v. Dawson*, 6 Beav. 371, and 9 *id.* 247; *Burden v. Burden*, 1 V. & B. 170. See, however, *Cook v. Collingridge*, Jac. 622, 623.

(*s*) Jac. 607. See the decree in 27 Beav. 456. *Stocken v. Dawson*, 9 Beav. 239, and on appeal 17 L. J. Ch. 282, was a somewhat similar case.

In *Townsend v. Townsend*, (t) three brothers, A., B., C., were in partnership, under articles by which it was provided that the capital of the partners should not be withdrawn until the \*expiration of seven years from that [\*529] date; that in case of the death of one of the partners within that term, a valuation of his share should be made, and that the surviving partners should pay to his representatives the amount of such valuation within three years from the said term of seven years, and in the meantime give sufficient security for the same by a mortgage of a competent part of the partnership property. It was also provided that it should not be lawful for the representatives to commence any action for recovering payment of the share of the deceased until the end of three years after the expiration of the term of ten years, nor to claim any participation in the profits made after the day up to which the valuation was made; the expressed intention being that the representatives of the partner dying should take 5% per cent. on the value of the share in lieu of profits. It was further provided that nothing should prejudice the right of the representatives within the term of seven years to take any proceedings in order to obtain a fair valuation, or to obtain and enforce the mortgage security. In April, 1844, A. died, having by will devised his real and personal estate to B., C. and D. upon trust to raise the sum of 12,000% and invest the same in government or real security, and apply the proceeds towards the maintenance and education of the plaintiff, his then infant daughter, and accumulate the surplus at compound interest; and upon his daughter attaining twenty-one to pay the accumulations to her, and to stand possessed of the capital on trust to pay her the proceeds during her life. The testator's estate consisted almost entirely of his share in the partnership. In December, 1844, a valuation was made by which the testator's share was ascertained to be 20,000% and upwards. In June, 1853,

(t) 1 Giff. 201.

being more than ten years from the date of the articles, certain hereditaments, consisting of freeholds, leaseholds and machinery (part of the partnership assets), were mortgaged by B. to C. and D. as a security for the 12,000*l.* (u) The plaintiff came of age in 1857, and in 1858 B. and C. rendered to her an account of the trust funds, in which they debited her with various items for maintenance and [ \*530 ] education, with 5*l.* per cent. interest thereon, and credited her with the sum of 12,000*l.* and interest at 5*l.* per cent. with yearly rests up to the 1st of May, 1853, and thenceforth with interest at 4*l.* per cent. with yearly rests. The plaintiff, however, insisted that the 12,000*l.* had been continued in the partnership business, and she filed a bill against B., C. and D. for an account of the profits made in the partnership business on the sum of 12,000*l.* from the testator's death, and for payment of what should be found due to the plaintiff, alleging that the mortgage was an improper security. The court held, 1, that the plaintiff was entitled to an account of the legacy of 12,000*l.*, with interest at 5*l.* per cent. from one year after the testator's death up to the 1st January, 1849 (ten years from the date of the articles), and with compound interest on the surplus, after allowing for sums expended for her maintenance and education; 2, that the plaintiff was entitled to an account of the profits made by the partners from the 1st January, 1849, on the balance found due for the principal at that date, with interest at 5*l.* per cent. and annual rests; 3, that she was entitled to a decree for payment of what should be so found due; and 4, that the entry of the sum of 12,000*l.* in the account furnished by B. and C. must be taken as conclusive against them that they had such a sum in their hands. It was considered that the mortgage had not the effect of withdrawing the 12,000*l.* from the business; it was part of a plan for keeping the money in the business; and the 12,000*l.* ought not to have been left

(u) The property, so far as it could be regarded as an authorized security, was not an adequate security for 12,000*l.*



on the security of property from which the trustees ought to have recovered it.

In *Macdonald v. Richardson*, (*x*) a partner died, leaving his copartner and another person his executors, and the copartner executor afterwards took other persons into partnership with him. The testator's assets having been kept in the business, the legatees filed a bill against the executors, and them only, claiming an account of profits since their testator's death; and a decree was made in their favor. (*y*)

In *Flockton v. Bunning*, (*z*) a partner died, leaving his wife \*his executrix, and having directed her to [\*531] get in his estate and invest it for the benefit of herself and children. She wound up the partnership in which her husband was engaged, but continued to carry on the business with his capital, in partnership with other persons, who knew that in so doing she and they were committing a breach of trust. (*a*) A bill was filed by some of the children against her and her copartners, seeking to make them jointly and severally liable for the trust estate employed in the business and for the profits made by its use; and a decree to that effect was made and was affirmed on an appeal by the wife's partners. This case was decided on the principle that the wife's partners were clearly implicated in the breach of trust committed by her, and were jointly and severally responsible with her for the trust estate and all the profits made thereby. The widow's capital was trust property; there was no loan as in *Stroud v. Gwyer*, (*b*) but the widow's capital became part of the capital of the firm; and she and her copartners wrongfully traded with it. (*c*)

(*x*) 1 Giff. 81. See, also, *Docker v. Somes*, 2 M. & K. 655.

(*y*) It is not quite clear whether the executor, who was a partner, was ordered to account for more profits than he received or not.

(*z*) 8 Ch. 323, note. The writer was counsel for the appellants, and this statement of the case was

written from the short-hand writer's notes of the judgment.

(*a*) In fact she agreed to indemnify them against the consequences.

(*b*) 28 Beav. 130, *ante*, p. 521.

(*c*) Compare this case with *Vyse v. Foster*, L. R. 7 H. L. 318, and 8 Ch. 309, noticed *infra*, p. 534.

Both L. J. Wood and L. J. Selwyn agreed that a mere loan, although in breach of trust, would not involve liability to account for profits, but that trust property which was traded with by a trustee in partnership with others could not be regarded as a loan. (*d*)

**Option in these cases.**—The right of the *cestui que trust* against his trustee in these cases is to an account of profits made by him by the use of the trust property, or at the option of the *cestui que trust* to simple interest at 5% per cent.; (*e*) or in special cases to compound interest. (*f*)

[\*532] \*The next class of cases which it is necessary to notice is that in which surviving or continuing partners were held not liable to account for profits made after dissolution.

The first of these was *Simpson v. Chapman*. (*g*) There three persons were partners as bankers. The bank was in such good credit as to render no capital necessary for the purpose of carrying it on. One of the partners died, leaving his son, one of the surviving partners, and a third person, his executors. At the time of his death the assets of the bank exceeded its liabilities. The estate of the deceased was a creditor of the bank to the extent of his share, viz., one-third of its net assets, but there was a much larger sum owing from his estate to the bank on his overdrawn private account. The son, being also an executor of the deceased, was admitted as a partner in the bank, and the business was carried on by the son and surviving partners, but the amount of the deceased's share in the business was never paid out,

(*d*) See, also, as to this, *Travis v. Milne*, 9 Ha. 141, where, however, interest only was ordered to be paid.

(*e*) *Heathcote v. Hulme*, 1 Jac. & W. 122.

(*f*) If the trustee's duty is to call in the money and accumulate the income he will be charged with compound interest; there may possibly be other grounds for so charg-

ing him. See *Jones v. Foxall*, 15 Beav. 388; *Williams v. Powell*, id. 461, and Lord Selborne's observations in *Vyse v. Foster*, L. R. 7 H. L. 346.

(*g*) 4 De G. M. & G. 154. This case is the more important as the non-liability to account for subsequent profits was decided on the hearing of the cause.

or separated from the moneys of the bank. Considerable profits were made by the new partnership, and of these the son, as partner, received his share. A suit was instituted for the administration of the estate of the deceased, but to such suit the executors alone were defendants, and a decree was made charging the son, and the surviving partner, who was an executor, in respect of the profits of the bank from the death of the deceased, paid to the son, so far as such profits had accrued from the assets of the deceased employed in the partnership. This part of the decree was appealed from and reversed, and one of the grounds for the reversal was that the profits acquired after the death of the deceased could not be attributed to the use made of his capital. If the debt due from him to the bank were omitted from its assets, the bank was at his death insolvent. The deceased had no capital in it in the ordinary sense of the word, and all the profits which had accrued were attributable to the connection and reputation of the bank. It was urged that the son, who had received one-third of the profits, and who could not distinguish how much of them was attributable to his character \*of executor, and how [\*533] much belonged to him in his individual character as partner, ought to be charged with the whole. But it was held that this principle did not apply, inasmuch as he did not carry on the business as an executor, but in his own separate and individual right, conceiving that he was entitled so to carry it on.

Another case of the same class was *Wedderburn v. Wedderburn*.<sup>(h)</sup> There three persons were partners as merchants; one died, leaving the other two and his widow his executors. The surviving partners alone proved the will, and they drew up an account of the partnership assets and credited the estate of the deceased with a certain sum as his share in the concern, but this share was never separated from the assets of the continuing firm. Several changes

(h) 2 Keen, 722; 4 M. & Cr. 41; and 22 Beav. 84.

afterwards took place in the new firm, and then a suit was instituted by persons interested in the estate of the deceased partner, against the executors and surviving partners of the deceased, praying for an account of his estate, and for an account of the gains and profits made by carrying on the partnership after his death. A decree was made directing an account of the personal estate of the deceased partner; and of the dealings and transactions of the firm up to his death; and of what at that time was the value of his interest in the concern; and of the profits of the trade carried on by the succeeding firms; and of the moneys which were from time to time taken out of the concern and applied on account of the estate of the deceased; and of the amount of capital from time to time employed in the said firms respectively. (i) It appeared that at the death of the deceased the assets of the firm consisted almost entirely of debts due to it; that it was impossible, except at a great sacrifice, to get in these debts in a short time; that if an attempt had been made to wind up the affairs of the concern at the death of the deceased the assets of the firm would not have sufficed to discharge its liabilities; and that the ultimate solvency of the firm was attributable to the cautious and prudent conduct of the surviving partners, and to their having, from time to time, provided large sums of [\*534] money to meet \*pressing liabilities. (k) It thus, in fact, appeared that the profits made since the death of the deceased were made by the credit and connection of the house, and by the reputation, skill and ability of the surviving and later partners, and were not attributable to the surplus assets of the firm in which the deceased had a share. It further appeared that the share of the deceased had been preserved entirely by the prudent management of the executors, and would have been certainly reduced to nothing if they had wound up the affairs of the house in the ordinary way, or had thrown the estate of the deceased into

(i) 2 Keen, 752.

(k) See 22 Beav. 84.

chancery. Under all the circumstances of the case it was therefore held that as by the partnership articles the plaintiffs had no interest in the good-will of the concern they were not entitled to participate in the profits made by the successive firms, so far as those profits were attributable to the good-will and connection in trade of the old firm; and that their share in any profits attributable to any other source was covered by interest on the amount at which the share of the deceased had been valued.

Lastly, in *Vyse v. Foster*, (l) the partnership articles provided that on the death of a partner the amount of his share should be ascertained and paid out with interest, by instalments, running over two years. A partner died leaving three executors, one of whom was a surviving partner. The share of the deceased was ascertained; it was not, however, paid out at the end of two years, but was kept in the business, which was carried on for many years, first by one and then by two of the executors, with other persons. The continuing firms paid interest on the capital of the deceased partner, and all the persons beneficially interested in his estate, except the plaintiff, acquiesced in this arrangement. The plaintiff, soon after coming of age, demanded her share of the estate of the deceased, and also the profits made by its employment in the business. The firm paid her the principal sum due to her, with compound interest, at 5% per cent., but declined to account \*to her for [\*535] any profits. She thereupon filed a bill against the executors, and them alone, for an account of the profits. A decree was made in her favor, and the defendants were declared liable for all the profits made by the successive firms by the use of her share of the deceased partner's estate. The court of appeal, however, reversed this decision, and held that although there had been technically a breach

(l) 8 Ch. 309, and L. R. 7 H. L. deceased. See 10 Ch. 236. See the Ca. 318. The case came again before the court as to the mode of ascertaining the amount due to the Law Quarterly Review for 1887, p. 211.

of trust in not paying out the capital of the deceased partner as provided by the partnership articles, still the plaintiff could not possibly be entitled to charge the defendants in the suit, as constituted, with more profits than they had themselves received; and as the evidence showed that they had acted throughout with perfect fairness, the court of appeal refused even an account of these profits, and held that under all the circumstances of the case the plaintiff was only entitled to her share of the testator's estate, with the compound interest at 5% per cent. which had been offered to her. The decision in this case is extremely important, as it decided, 1, that the clause in the partnership articles was binding both on the executors of the deceased partner and on the surviving partners, although one of them was also an executor; 2, that the amount due to the estate of the deceased was in effect a loan to the survivors, and its non-payment at the time and in manner prescribed by the articles of partnership did not entitle the plaintiff to any profits, but only to interest; 3, that, even if the plaintiff's claim to profits could have been sustained, the executor who was not a partner would not have been liable for such profits; and 4, that the executors who were partners would not have been liable for more profits than they respectively themselves received. (*m*)

**Observations on the foregoing cases.**—The law upon the subject under consideration is still in an unsettled state. Undoubtedly a person ought not to be permitted to retain for his own use gains acquired by the unlawful employment of another's property; and it would certainly not be conducive to justice if there were no power to compel a discovery of the amount of the gains so made and [\*536] payment of that amount by the wrong-doer. (*n*)

At the same time, owing to the extreme difficulty of

(*m*) See, as to this, *Flockton v. Bunning*, 8 Ch. 323, note, *ante*, of Lord Cairns in *L. R. 7 H. L. 333-4*. (*n*) See the admirable judgment of Lord Brougham in *Docker v. Somes*, 2 M. & K. 672.

taking an account of subsequent profits, so far as they are attributable only to one particular source, the tendency of the courts in modern times appears to be rather in favor of not exercising than of exercising the power alluded to, except in cases of gross fraud or breach of trust. (*o*) In such cases, however, the court will exert itself to the utmost; and the efforts which it will make in order to prevent persons from deriving advantage from their own wrong cannot be better illustrated than by the case of *Featherstonhaugh v. Turner*. (*p*) The profits of the partnership business there arose entirely from the skill and reputation of the partners, who were medical gentlemen. In order to ascertain the share of the deceased in the profits made after his death by the surviving partner, an inquiry was directed whether any and what profits made since the death of the deceased were attributable to or derived from persons who had become customers by reason of the deceased having been a partner, and it was considered that the surviving partner was liable to pay what might be found due on taking that account after deducting a liberal allowance to him for his time, knowledge and expenses in realizing the profits in question.

*With respect to the evidence upon which the accounts are to be taken.*

**Evidence on which accounts are taken.**<sup>1</sup>—As regards the partnership books. These being accessible to all the partners,

(*o*) Judgments for an account of profits after dissolution are fearfully oppressive; and the writer is not aware of any instance in which such a judgment has been worked out and has resulted beneficially to the person in whose favor it was made.

(*p*) 25 Beav. 382.

<sup>1</sup>In a bill for a partnership account the proof must sustain every essential allegation. *Kellogg v. Moore*, 97 Ill. 282.

As to who has the burden of proof upon an accounting, see *Lambert v. Griffith*, 44 Mich. 65.

Items of labor and material furnished by one of the partners should, upon an accounting, be proved with a reasonable certainty before any allowance can be made therefor. To allow as evidence an aggregate estimate as to the yearly cost of repairs, grouping together labor of the partner, his employees and the cost of the materials used, is error. *Chandler v. Allen*, 20 Hun (N. Y.), 424.

Where the plaintiff and defendant entered into an agreement for supplying a railway with iron and for a division of the profits, but

and being kept more or less under the surveillance of them all, are *prima facie* evidence against each of them,<sup>1</sup> and, therefore, also for any of them against the others. (q)<sup>2</sup> But entries made by one partner without the knowledge of [537] the other do not prejudice the latter as between \*himself and his copartner; (r)<sup>3</sup> and where a surviving

no division was made, and the defendant went on investing receipts from that enterprise in other contracts, in which the plaintiff claimed a like interest, *held*, that the burden of negating the plaintiff's right rested on the defendant, and, having failed to sustain the burden, a reference to take the accounts between the parties was directed. *Cameron v. Bickford*, 11 U. C. App. 52.

<sup>1</sup> Partnership books are admissible evidence as against the defendant firm to show whether plaintiff's accounts upon the firm books show the credit to him of the amount claimed. *Grant v. Masterton*, 55 Mich. 161.

(q) See *Lodge v. Prichard*, 3 De G. M. & G. 906, and *Smith v. The Duke of Chandos*, 2 Atk. 158, and *Barn*. 412. But see the observations of L. J. Turner in *Stewart's Case*, 1 Ch. 587.

<sup>2</sup> *Heartt v. Corning*, 3 Paige, 566; *Fletcher v. Pollard*, 2 Hen. & Munf. 544; *Brickhouse v. Hunter*, 4 id.

(r) *Hutcheson v. Smith*, 5 Ir. Eq. 117. See, also, *Reeve v. Whitmore*, 2 Dr. & Sm. 446, where it was held that, although books kept by a person may be used against him as showing what he has received, he is not entitled to use them in his own favor to show what he has paid.

<sup>3</sup> It will be assumed, in the ab-

363; *Richardson v. Wyatt*, 2 Dessaus. 471; *Dunnell v. Henderson*, 23 N. J. Eq. 174; *Stewart v. McKichan*, 74 Ill. 122; *Albe v. Wachter*, id. 173; *Boire v. McGuin*, 8 Oreg. 466; *Cheever v. Lamar*, 19 Hun, 130; *Routen v. Bostwick*, 59 Ala. 360; *Cunningham v. Smith*, 11 B. Mon. 325; *Myers v. Bennett*, 3 Lea, 184; *Over v. Hetherington*, 66 Ind. 365; *Lambert v. Griffith*, 44 Mich. 65; *Murrell v. Murrell*, 33 La. Ann. 1233; *Glover v. Hembree*, 82 Ala. 324; *Carpenter v. Camp*, 3 So. West. Rep. (La.) 269 (suit for a partition); *Godfrey v. Templeton*, 6 So. West. Rep. (Tenn.) 47. See *Ferguson v. Wright*, 61 Penn. St. 258; *Sutton v. Mandeville*, 1 Cranch, C. C. 2.

The rule is the same though the books are kept by a clerk. *O'Brien v. Hanley*, 86 Ill. 278; *Allen v. Coit*, 6 Hill, 318.

Where partners employ clerks to make a statement of the firm accounts for the purpose of aiding them in making a settlement be-

sence of proof to the contrary, that the indebtedness of a partner to the firm appears upon its books, and that such books were open to the examination of the other partners. An alleged ignorance of the existence of such indebtedness will be considered as the result of negligence. *Over v. Hetherington*, 66 Ind. 365.



partner drew up an account which he furnished to the executors of his late partner, it was held that such account was

tween themselves, such statement is *prima facie* evidence and binding upon them as to all items to which they at the time mutually assented, but not binding as to disputed items and claims. *Rehill v. McTague*, 114 Pa. St. 82.

As to the relative weight as evidence of the written transactions of a partnership between relatives as against the recollections of the parties, see *Wiswall v. Ayres*, 51 Mich. 324.

One of the members of the firm kept the time of the men employed in a pass or time-book, and reported the time of each man weekly to the book-keeper, who entered it on the books of the firm, and when the men were paid, if they claimed more time than had been reported to the book-keeper, the partner keeping the time was called in and the books corrected in accordance with the facts. Sometimes the partner keeping the time was sick or absent and then the book-keeper got the men's time from other sources. On a settlement of the partnership affairs, the partner who had kept the time of the men claimed that the books of the firm were incorrect, because there was more time shown by them than his time book showed. *Held*, that, under the circumstances, the books as kept by the clerk were binding on both partners. *O'Brien v. Hanley*, *supra*.

The ordinary presumption is that all the partners have access to the partnership books and know the entries therein; but this is a mere presumption from the ordinary

course of business, and may be repelled by any circumstances which tend to a contrary presumption. *United States Bank v. Binney*, 5 Mason, 176; *Shoemaker Piano Co. v. Bernard*, 2 Lea, 359. See *Over v. Hetherington*, 66 Ind. 365.

Entries in partnership books are not evidence for one partner against another on an accounting between them, unless it appears, or may be presumed, that the latter not only had access to the books but actually inspected them. *Taylor v. Herring*, 10 Bosw. 447; *Saunders v. Duval*, 19 Tex. 467.

The rule that entries in the books of a firm are evidence against all of the parties is true only of those made whilst the firm is doing business. Entries so made by a partner who is winding up the partnership under a transfer to him for that purpose are not, *per se*, evidence against a copartner. *Clements v. Mitchell*, Phill. Eq. 3.

Entries, however, made after a dissolution, by the partner who closes the concern, in the partnership books, which are open to the examination of the other partner, and are in fact examined by him, and from which, by agreement of the partners, an accountant has made up an account between them, are competent evidence for or against either partner. *Cameron v. Watson*, 10 Rich. Eq. 64.

Where a surviving partner and liquidator suffers several years to elapse before rendering an account, and he has kept the books so carelessly that it is impossible to determine from them with any certainty

admissible against the partner who furnished it, and that the executors were not bound, by using it against him, to admit its correctness throughout. (*s*)

how the firm stood at its close, his account will be rejected, and he charged with all entries against himself, and allowed credit only for such liabilities as he proves he has paid. *Leftwitch v. Leftwitch*, 6 La. Ann. 346.

Partnership books to which each party has had access are *prima facie* evidence as between the partners; but the partners cannot, in lieu of the statement required, put in their general books of accounts, consisting often of immense folios, which neither the clerk nor the court can be required to examine. It is the duty of the parties to have them examined by experts to ascertain what they do show, and to extract from them, in the form of balance-sheets and schedules, such general statements and such specific facts as may tend to elucidate contested matters of charge and discharge. *Meyers v. Bennet*, 3 Lea, 184.

Transcripts from partnership books, and not the books themselves, should be returned to the supreme court on an appeal for an accounting, unless there is something in the appearance of the books which it is necessary to consider on questions of fraud or forgery or some special difficulty; otherwise parties ought not to be deprived of the custody of their books. *Harrison v. Dewey*, 46 Mich. 173.

Where a partnership account is ordered each partner is an actor,

and, unless all the parties join in employing a competent accountant to make out a balance-sheet of the business with proper schedules, each should be required to furnish his own statement of the account. *Meyers v. Bennet*, 3 Lea, 184.

The books of partnership are competent evidence to show what are debts of the partnership as against the partner who, upon the dissolution of the partnership, has purchased the assets of the partnership, and has undertaken to pay its debts. *Shackleford v. Shackleford*, 32 Grat. 481.

Books of firm are evidence that one of two partners, joint makers of a note, was surety for the other. *Strong v. Baker*, 25 Minn. 442.

Where a partner was familiar with the books of the concern, he may testify from his own recollection, so invigorated by the books, as to the amount of the advance of his copartner beyond himself in the payment of the debts of the firm, without producing the books. *Bank v. Donaldson*, 6 Pa. St. 179.

Where the firm business has been almost exclusively conducted by one partner, who kept the books, the other may introduce evidence of the incorrectness of entries therein, and also show that others not entered should be made. *Carpenter v. Camp*, 3 So. Rep. (La.) 269.

The books of the firm should be shown to be clearly erroneous before a party should be permitted

---

(*s*) *Morehouse v. Newton*, 3 De G. & Sm. 307.

**Special directions on this subject.**—Where, in consequence of the loss of books and documents, an account can-

to recover beyond the same for a matter which ought to have been entered regularly every day. *Parker v. Jonté*, 15 La. Ann.

The best evidence and data of the losses and profits of the partnership are the books of the firm, and the opinions and experience of other merchants in the same town were not admissible to determine the amount of profits. *Cunningham v. Smith*; 11 B. Mon. 325.

Where, however, the books of a partnership fail to show the true state of its business, resort may be had to a calculation of the profits from the amount of merchandise proved to have been sold by said firm, at the rate per cent. profit proved to have been made on said merchandise in that particular business, but not to expert testimony of witnesses engaged in a similar business to prove that profit was made by this firm in their business for the purpose of charging one of the partners therewith. *Boire v. McGuire*, 8 Oreg. 466.

On the trial of an action between partners in a mill and ferry, in which the issues are as to the state of accounts, and whether there have been any profits, the testimony of a witness who had run the mill and ferry previously, in partnership with one of the parties, to the effect that the expenses at that time were greater than the receipts, is irrelevant and inadmissible. *Saunders v. Duval*, 19 Tex. 467.

Stubs in check book in connection with the checks admissible as tending to prove certain demands

to be unsettled partnership matters. *Bowzer v. Stoughton*, 119 Ill. 47.

Where the plaintiff in a bill for an account had for a long time joint transactions of great magnitude with defendant, in whom he had unbounded confidence and to whom he intrusted the entire management, and the business was done by defendant's firm in Chicago, but accounts were sent to his Milwaukee house, where plaintiff had free access to them, *held*, that in a settlement between them plaintiff was not guilty of negligence in relying upon these statements of defendant's as to the amounts of money advanced by each of them. *Wells v. McGeoch*, 35 N. West. Rep. (Wis.) 769.

Where a partner had collected accounts in favor of the firm without making any entry of the amounts so collected, it was *held* that where the amount of such collections was ascertained he was properly chargeable therewith. *Evans v. Montgomery*, 50 Iowa, 325.

While the failure to keep accounts by the partner in charge of the partnership concerns might render an adjustment difficult, yet it could not be taken advantage of by a copartner who had commenced an action and asked an accounting. *Evans v. Montgomery, supra*. As to the effect of keeping no books or of destroying them, see *ante*, 808.

As to the *onus probandi* in suit for an account, a partner who, upon the settlement of a partnership ac-

not be taken in the usual way, special directions will be given as to the mode in which the accounts shall be taken

count, claims a balance due him from the firm, which is denied by the other, has the burden of proof, in the absence of entries of account made at the time of the alleged transaction. *McCabe v. Franks*, 44 Iowa, 208; *Camblat v. Tupery*, 2 La. Ann. 10; *Maupin v. Daniel*, 3 Tenn. Ch. 223; *McMichael v. Ravul*, 14 La. Ann. 307.

A partner who complains of error in the settlement of a partnership account, approved by the signature of the partners, should make it appear by proof. *Bry v. Cook*, 15 La. Ann. 493.

In a suit by one partner against another to recover contribution to a loss in the concern, a statement in the defendant's handwriting of an account showing a balance due to the plaintiff from the firm is evidence for the plaintiff. *Yohe v. Barnet*, 3 Watts & S. 81.

In an action of account between partners, in which the plaintiff claims that the defendant account for money received by him from the avails of the business during the partnership, an agreement, executed by the plaintiff and delivered to the defendant previous to the commencement of the action, in which it is recited that the defendant has relinquished to the plaintiff all claim to the demands due to the firm and to the stock of the firm, in consideration of which the plaintiff promises to pay the debts due from the firm, and to indemnify the defendant against them, has no legal tendency to sustain a plea by the defendant that he has fully accounted for the

money claimed in the declaration. *Woodward v. Francis*, 19 Vt. 434.

In an action to wind up a partnership between A. and B. evidence that A. put into the concern money belonging to a third person which he held as agent is irrelevant. *Harper v. Lamping*, 33 Cal. 641.

A decree that one partner shall pay money to his copartner without any proof of its actual or constructive receipt by the former, or that it has been lost by his negligence or misconduct, is erroneous; and where the only evidence given was that the defendant had received "a certificate of debt from the Chesapeake & Ohio Canal Company," in December, 1833, or January, 1834, after a settlement with the company, and the bill which assumed its payment to him was filed in June, 1835, *held*, that it was too short a time to authorize a presumption of payment sufficient to charge him personally, where there was nothing in the nature of the settlement to impose such responsibility. *Grove v. Fresh*, 9 Gill & J. 280.

In an action on accounts due from a firm, upon a defense that the plaintiff and his assignors had agreed with the defendants that the amounts due from the latter should be transferred to and credited upon the account of one of said partners, and such transfer and credit had been made accordingly, the partnership books are admissible to show that the agreement has been performed. *Moore v. Knott*, 14 Ore. 35.

and vouched. The power to give such a direction is expressly conferred by Ord. XXXIII, r. 3. (*t*)

**Production of books, etc.**—The judgment for an account usually directs that all parties shall produce on oath all books and papers in their custody relating to the taking of the accounts. If any partner has kept accounts relating to the partnership in private books of his own he must produce such books; for he should have kept his private accounts elsewhere if he did not want them to be seen. (*u*)<sup>1</sup> After a dissolution new books are generally opened; but if they relate to the accounts which have to be taken they must be produced; (*x*) and even if a partner not before the court objects to their production, it is by no means clear that his objection will prevail. (*y*) As between partners \*and their representatives, material documents [\*538] must be produced, though they may be privileged as between them and other persons. (*z*)

**Consequence of non-production.**—If a partner has books or accounts in his possession, and he will not produce them,

(*t*) This rule was framed on 15 and 16 Vict. ch. 86, § 54, repealed by 46 and 47 Vict. ch. 49, § 3. See, as to the old practice, *Rowley v. Adams*, 7 Beav. 395; *Millar v. Craig*, 6 id. 444; *Turner v. Corney*, 5 id. 515; *Adley v. The Whitstable Co.* 17 Ves. 327. See the decrees in *Stainton v. The Carron Co.* 24 Beav. 363. Special directions were only given when necessary. See *Lodge v. Prichard*, 3 De G. Mac. & G. 906; *Ewart v. Williams*, 7 id. 68. The Bankers' Books Evidence Act, 42 and 43 Vict. ch. 11, facilitates the procuring of evidence. See on it, *Harding v. Williams*, 14 Ch. D. 197 (which query); *Re Marshfield*, 32 Ch. D. 499, which was varied on appeal; *Arnott v. Hayes*, 36 Ch. D. 731.

(*u*) *Pickering v. Pickering*, 25 Ch.

D. 247; *Toulmin v. Copland*, 3 Y. & C. Ex. 655; *Freeman v. Fairlie*, 3 Mer. 43. Liberty will be given to seal up those parts which are sworn not to relate to the matters in question in the suit. *Ante*, p. 507.

<sup>1</sup> A private cash-book kept by one partner is admissible in evidence upon an accounting between partners to show that such partner has accounted to the firm for money collected by him on partnership accounts. *Converse v. Hobbs*, 7 E. R. 192; S. C. 5 Atl. R. 832; 2 N. Eng. R. 855.

(*x*) *Hue v. Richards*, 2 Beav. 305. See the last note.

(*y*) See *Freeman v. Fairlie*, 3 Mer. 43. But see *ante*, p. 503.

(*z*) See *Brown v. Perkins*, 2 Ha. 540, where the excuse of professional confidence was set up.

an account may, nevertheless, be arrived at by presuming everything against him. Thus, in a case where an account was directed at the suit of the representatives of a deceased partner against the surviving partner, and the latter would not produce the books necessary to enable the master to take the accounts, the master estimated the net profits at 10*l.* per cent. on the capital employed, and the court, on exceptions to his report, confirmed it, adding that if he had set the net profits down at 20*l.* per cent. his report would have been equally confirmed. (a)

**Accountants.**—The court has power to employ professional accountants to assist it in taking accounts, and the court may act on their report. (b)<sup>1</sup>

## 2. *Of injunctions.*

**Injunctions and receivers.**—In order to prevent a partner from acting contrary to the agreement into which he may have entered with his copartners, or contrary to the good faith which, independently of any agreement, is to be observed by one partner towards his copartner, it is sometimes necessary for a court to interfere either by granting an *injunction* against the partner complained of, or by tak-

(a) *Walmsley v. Walmsley*, 3 Jo. & Lat. 556. And see *Gray v. Haig*, 20 Beav. 219.

(b) See Jud. Act, 1873, §§ 56, 57, and Ord. xxxiii, r. 2; xl, r. 10; lv, r. 19. And see *Hill v. King*, 1 N. R. 341, L. C.; *Ford v. Tynte*, 2 De G. J. & Sm. 127; *Re London, Birmingham and Bucks. Rail. Co.* 6 W. R. 141. As to production to accountants, etc., see *ante*, p. 504.

<sup>1</sup> The court has power to perform the duties ordinarily performed by its master in stating a partnership account between the parties; and in such case each party has the same rights before the court in regard to the production of books,

examination of interrogatories, etc., that he could have before the master. *Montanye v. Hatch*, 34 Ill. 394.

A complex and intricate account is, however, an unfit subject for examination in court, and ought always to be referred to a master to be examined by him and reported in order to a final decree. *Patten v. Patten*, 75 Ill. 446; S. C. 14 Am. Law Reg. N. S. 733; *Moss v. McCall*, 75 Ill. 190; *Steere v. Hoagland*, 39 Ill. 264; *Bressler v. McCune*, 56 Ill. 475; *Riner v. Tousle*, 62 Ill. 266; *Grouch v. Stenger*, 65 Ill. 481; *Dubourg v. United States*, 7 Pet. 625.

ing the affairs of the partnership out of the hands of all the partners, and intrusting them to a *receiver* or *receiver and manager* of its own appointment.<sup>1</sup>

<sup>1</sup>The general rule respecting the exercise of the jurisdiction to issue injunctions in partnership matters, and in connection with receivers, is thus stated by Mr. High (vol. 2, §§ 1330, 1350, 1351) in his valuable work on injunctions: "Courts of equity will entertain jurisdiction to prevent by injunction members of a copartnership from the commission of acts inconsistent with the terms of their agreement and from violating the rights of their copartners. The jurisdiction is founded upon well-established principles of equity, and is exercised irrespective of whether a dissolution of the partnership is sought. Thus, where several partners are engaged in trade, one of their number may be enjoined from using force to the obstruction or interruption of the trade, and from removing or displacing servants employed by the other partners, and from removing the books and papers relating to the business. And where one of the members of a firm has been temporarily insane, and on his recovery his copartners exclude him from the management of the firm business, an injunction will be allowed to restrain them from thus excluding him from the business. So, where a partnership is formed for a term of years, to be terminated on notice by either party for a given length of time, an injunction will be granted to prevent one partner from obstructing the other in the enjoyment of his partnership rights and from any improper use of the partnership funds or ef-

fects. And the use by one partner of firm property for purposes foreign to the partnership and in violation of the articles, and without the consent of his copartner, affords sufficient ground for an injunction. But mere temptation to dishonesty and to the abuse or improper use of partnership property will not of itself induce a court of equity to interfere. And where all the partners save one engaged in the publication of a newspaper are also partners in a rival publication, an injunction will not be granted to restrain one of the papers from using the material of the other under a contract which has been long acted on. But an injunction is proper in such a case to prevent one of the papers from publishing any information obtained exclusively at the expense of the other until published in the paper thus obtaining it.

"The extraordinary remedy of equity by injunction in partnership matters is frequently invoked in connection with the appointment of receivers, although the two remedies are not necessarily or always invoked or granted at the same time. In general it may be said that when upon the dissolution of a partnership the members of the firm are unable to agree upon the manner of closing up its affairs, it is the usual practice of courts of equity, with a view to protect the rights of all parties in interest, to exclude all the partners from participating in the business of closing up the firm, and to appoint a re-

These two modes of interference require to be considered separately; for they are not had recourse to indiscriminately. The appointment of a receiver, it is true, always operates as an injunction, for the court will not suffer [\*539] its officer to be inter\*fered with by any one; (c) but it by no means follows that because the court will not

ceiver for that purpose, and in that event an injunction is proper to prevent one partner from participating in the winding up of the firm. But to warrant a receiver and an injunction in partnership cases such a state of facts must be shown by the plaintiff as, if proved at the hearing, will entitle him to a decree for a dissolution of the firm. And in determining whether the conduct of one partner has been such as to entitle the other to a dissolution, in passing upon an application for an injunction and a receiver, the court will consider not merely the specific terms of the contract of partnership, but also the duties and obligations which are implied in every such undertaking, and if it is manifest that the conduct of the defendant partner has been so injurious to the firm and so inconsistent with his duties as a partner as to entitle plaintiff to a dissolution, a receiver and an injunction will be allowed. But, although an interlocutory injunction has been granted, *ex parte*, upon a bill by one partner seeking a dissolution, it does not necessarily follow that a receiver will be appointed over the affairs of the firm, and if the court is satisfied that such a case is not presented as to entitle plaintiff to a final dissolution, it will refuse to appoint a receiver, notwithstanding such injunction, leaving the injunction to

be dissolved in due time and upon proper motion."

"The fact that the conduct of the defendant partner has been such as to destroy the mutual confidence which ought to subsist between partners is an important element influencing the court in granting relief by injunction and a receiver in partnership cases. And when the pleadings disclose a serious and apparently irreconcilable disagreement between the partners as to the control and disposition of their property and effects and as to their respective demands against each other, the appointing of a receiver and allowing an injunction are regarded as a provident exercise of the powers of a court of equity, sanctioned alike by authority and by the exigencies of the case. So, when it is apparent that the defendant partner has deliberately resolved to break up and ruin the firm business, and the personal relations of the partners are such that they cannot carry on business with advantage to each other, sufficient cause is presented for an injunction and a receiver."

(c) See *Helmores v. Smith* (No. 2), 35 Ch. D. 449. However, the court will often grant an injunction as well as a receiver to mark its sense of the impropriety of the conduct of those it specially restrains. See *per V.-C. Kindersley in Evans v. Coventry*, 3 Drew. 82.



take the affairs of a partnership into its own hands it will not restrain some one or more of the partners from doing what may be complained of. (d)

**Injunction granted against a partner though no dissolution is sought — Restoring excluded partner.**— Whatever doubt there may formerly have been upon the subject, it is clear that an injunction will not be refused simply because no dissolution of partnership is sought. (e)<sup>1</sup> Where a

(d) See *Hall v. Hall*, 3 Mac. & G. 85.

(e) See Jud. Act, 1873, § 25, cl. 8, in addition to the cases below.

<sup>1</sup> A temporary injunction may be granted pending a suit for an accounting to prevent one partner by a sale of the partnership property from changing the *status* of the other partners in respect to it, where the injury resulting from the sale could not be remedied. *Wilkinson v. Tilden*, 9 Fed. R. 683.

The mere fact that partnership accounts are irregular and vague, and that the evidence respecting them is obscure, will not necessarily preclude a provisional injunction restraining interference with the assets and a decree for an account. *Slobig's Appeal*, 3 Cent. R. 406; S. C. 5 Atl. R. 670.

An injunction at the suit of one partner will be refused where there is a mere apprehension of loss, and there does not appear any breach of contract or duty, nor any misconduct amounting to fraud, in the remaining partners. *Walker v. Trott*, 4 Edw. 38.

Where the representatives of a deceased partner had enjoined the surviving partner from selling the joint property at public sale, *held*, that it should be dissolved, there being no charge of fraud, insolv-

ency or misconduct against the survivor, but a mere allegation of a refusal to account and no proof that the account had been withheld an unreasonable time. *Shad v. Fuller*, R. M. Charl. 501.

An injunction will be retained against a partner defendant where he may get possession of funds of the partnership before the settlement of his rights by the final decree. *Randall v. Morrell*, 17 N. J. Eq. 343.

Where articles of partnership provide that, in case of the dissolution of the partnership by the death or withdrawal of any of the partners, a general account shall be taken, and prescribe the manner in which the concern shall be settled and its assets be distributed, an injunction will not lie at the instance of the outgoing partners against the remaining partner until the latter has had an opportunity of closing up the concern under the articles of partnership. *Quinlivan v. English*, 44 Mo. 46.

Where one partner, holding notes for the benefit of the firm, attempts to pawn or pledge them for his own private debts, the court will interfere to restrain it. *Stockdale v. Ullery*, 37 Pa. St. 486.

A partner may by injunction hold his associates to the specified

partner who had been suffering from temporary insanity had recovered, but was excluded by his copartners from the

purposes of the partnership while the partnership continues. *Kean v. Johnson*, 9 N. J. Eq. 401.

Equity will enjoin one of several partners, who, by the partnership contract, has undertaken to superintend and manage the business, from carrying on the same business, at the same place, in a separate establishment, for his sole benefit, even though there be no express covenant restraining him from so doing. *Marshall v. Johnson*, 33 Ga. 500.

After a dissolution of a firm equity will restrain one partner from publishing the letters of another concerning the business of the firm, unless the purposes of justice, civil or criminal, require their publication. *Roberts v. McKee*, 29 Ga. 161.

Where the conditions of dissolution of a partnership were such that the retiring partner had the right to open and attend to, for his own benefit, letters thereafter addressed to the late firm, upon certain subjects of business, *held*, that the mere fact that he opened and answered in his own name and for his own benefit two fictitious or "decoy" letters, addressed to the late firm at the instance of the plaintiff, their successor, and purporting to be upon business which the former had not the right to attend to, did not authorize the court to interfere by action and injunction. *White v. Jones*, 1 Abb. Pr. (N. S.) 328.

An injunction restraining interference with the complainant in the exercise of his rights as a part-

ner of the defendants will be dissolved on the clear averment in the answer that the partnership was dissolved by mutual consent. *Van Kuren v. Trenton, etc. Co.* 18 N. J. Eq. 302.

The principles that an injunction should not be granted unless there is danger of irreparable loss, and that a prayer for equitable relief comes too late after a judgment at law, have no application to a bill in equity for an account and settlement of a copartnership, brought by one of the partners, who alleges that he was the lessee of the partnership property, and had paid out more than he had received; and that another partner, who held the legal title to the property, which equitably belonged to the company, had recovered judgment in ejectment against the complainant both for the premises and for mesne profits. *Wells v. Strange*, 5 Ga. 22.

In a suit seeking an equitable offset upon an account between former partners, and an injunction to restrain a suit at law by the defendant against the complainant upon notes given in course of partnership transactions, the mere assertion of a counter-demand will not warrant the retaining of the injunction issued upon filing the bill. Some facts must be alleged or account given whence the court can judge whether the complainant would probably be able to establish his claim. *Hewitt v. Kuhl*, 25 N. J. Eq. 24.

As to the measure of damages on an injunction bond given, where

management of the affairs of the partnership, the court restored him to his position in the firm by granting an injunction restraining the other partners from preventing him from transacting the business of the partnership. (*f*)

**Restraining improper acts.**—Again, in *England v. Curling*, (*g*) a partnership had been entered into for a term of years which had not expired. One of the partners insisted on a dissolution and retired from the partnership, and entered into another partnership which assumed the name of the old firm, opened the letters addressed to it, and circulated notices of its dissolution. But on a bill filed by the continuing partners of the old firm against their copartner and the other members of the new firm, the court granted an injunction restraining the retired copartner from carrying on business with his new partners or any other persons except his old copartners until the expiration of the term; and restraining his new partners from carrying on business with him, or otherwise, in the name of the old firm, and from receiving or opening letters addressed to it, and from interfering with its property; and restraining the retired partner from publishing or circulating any notice of the dissolution of the old firm before the expiration of the term for which it had been entered into.

\*So, in *Hall v. Hall*, (*h*) a partnership for twenty- [\*540] one years, determinable on twelve months' notice by either party, (*i*) was entered into by the plaintiff and the defendant; disputes arose, and the defendant wholly excluded the plaintiff from the partnership business. The plaintiff filed a bill praying that the articles might be performed, and, amongst other things, for an injunction, but not for a dissolution. An injunction was granted restraining the defendant from applying any of the moneys and effects of the

one partner has been enjoined for the collecting of partnership assets wrongfully, see *Terrell v. Ingersoll*, 10 Lea (Tenn.), 77.

(*f*) *Anon., Z. v. X.*, 2 K. & J. 441.

(*g*) 8 Beav. 129. See, too, *Warder v. Stilwell*, 3 Jur. N. S. 9.

(*h*) 12 Beav. 414; 20 id. 139, and 3 Mac. & G. 79. See, also, *Blisset*

*v. Daniel*, 10 Ha. 493.

(*i*) See 20 Beav. 139.

copartnership otherwise than in the ordinary course of business, and from obstructing or interfering with the plaintiff in the exercise or enjoyment of his rights under the partnership articles.

Again, in *Clements v. Norris*, (*k*) a partner who insisted on carrying on a branch of the partnership business against the will of his copartner was restrained from so doing. The lease of the place of business had expired and the plaintiff declined to renew it or to concur in taking any other place.

**Where one partner seeks to drive the others to a dissolution.**—These authorities show that, where a partnership is not determinable at will, those partners who are desirous of carrying on the business in the proper way will be protected by the court from the unwarranted acts of a copartner, whose only object may be to force the others to submit to him or to agree to a dissolution. (*l*)

**Injunction where the partnership is determinable at will.**—Where the partnership is determinable at will there is, it is said, more difficulty in interfering if a dissolution is not sought; for, supposing the court to interfere, the defendant may immediately dissolve the partnership. (*m*) But supposing him to do so, an injunction will not necessarily be futile, inasmuch as, so long as it continues in force, the defendant is rendered powerless for evil, and a notice by him to dissolve the partnership cannot, *per se*, operate as a dissolution of the injunction. In *Glassington v. Thwaites*, (*n*) the

plaintiff, who was one of the proprietors of the Morning Herald, obtained an \*injunction restraining his

• copartners, who were also proprietors of the English Chronicle (in which, however, the plaintiff had no interest), from publishing in the latter paper any information obtained at the expense of the former until it should have been first published in the Morning Herald. So, in *Morris*

(*k*) 8 Ch. D. 129.

(*m*) See *Peacock v. Peacock*, 16

(*l*) See, too, *Fairthorne v. Weston*, Ves. 49; *Miles v. Thomas*, 9 Sim. 606.

3 Hare, 387.

(*n*) 1 Sim. & Stu. 124.

v. *Colman*, (*o*) one of the proprietors of the Haymarket Theater was restrained from acting contrary to the articles of partnership by writing plays for other theaters. Again, where a partner had agreed not to sell his share without first offering it to the other partners, an injunction to restrain a sale was granted. (*p*) It does not appear from the reports of these cases whether the partnerships were partnerships at will or not; but supposing them to have been merely partnerships at will, it is clear that the injunctions were far from valueless.

**Injunction in actions for dissolution.**—In an action instituted for the purpose of having a partnership dissolved, or of having an account taken after a partnership has been dissolved, it has never been doubted that an injunction will be granted to restrain one of the partners from doing any act which will impede the winding up of the concern. (*q*) For example, one partner will be restrained from carrying on the concern for any other purpose than winding up; (*r*) from damaging the value of the good-will if it ought to be sold for the benefit of all; (*s*) from getting in the assets if he is likely to misapply them; (*t*) a surviving partner will be restrained from improperly ejecting the representatives of his deceased copartner; (*u*) and they, on the other hand, will be restrained from making any improper use of partnership property, the legal estate of which may happen to be in them. (*x*) \*So a surviving partner will be [\*542]

(*o*) 18 Ves. 437.

(*p*) *Homfray v. Fothergill*, 1 Eq. 567.

(*q*) A person who only shares profits is by no means necessarily in the same position as a partner in these respects. See *Walker v. Hirsch*, 27 Ch. D. 460.

(*r*) See *De Tastet v. Bordenave*, Jac. 516.

(*s*) *Turner v. Major*, 3 Giff. 442; *Bradbury v. Dickens*, 27 Beav. 53. In the last case the defendant was

advertising the discontinuance of a partnership periodical of which he was the editor.

(*t*) *O'Brien v. Cooke*, Ir. Rep. 5 Eq. 51. There the plaintiff was allowed to get them in, indemnifying the defendant against costs, etc.

(*u*) *Elliott v. Brown*, 3 Swanst. 489, n.; *Hawkins v. Hawkins*, 4 Jur. N. S. 1045.

(*x*) *Alder v. Fouracre*, 3 Swanst.

restrained from disposing of or getting in the partnership assets, if he has already been guilty of breaches of trust with reference to them. (*y*) But a surviving partner will not be restrained from continuing to carry on business in the name of himself and his deceased copartner unless so to do is contrary to his own agreement, or the good-will is a salable asset of the firm. (*z*) Again, in an action for a dissolution, a partner will be restrained from improperly interfering with or obstructing the partnership business; (*a*) from drawing, accepting or indorsing bills of exchange in the partnership name for other than partnership purposes; (*b*)<sup>1</sup> from getting in debts owing to the firm; (*c*) from withholding the partnership books; (*d*) and generally on a dissolution one partner will be restrained from injuring the property of the firm. (*e*)

**Injunction to protect partners from the representatives of a copartner.**—So the court will interfere by injunction to protect partners from the interference of persons claim-

(*y*) *Hartz v. Schrader*, 8 Ves. 317.

(*z*) See on this subject, *ante*, pp. 437, 448.

(*a*) *Smith v. Jeyes*, 4 Beav. 503; *Charlton v. Poulter*, 19 Ves. 148, n.

(*b*) *Williams v. Bingley*, 2 Vern. 278, note, and Coll. Part. 233; *Jervis v. White*, 7 Ves. 412; *Hood v. Aston*, 1 Russ. 412. In the two last cases, the injunction restrained *mala fide* indorsees for value from parting with or negotiating the securities.

<sup>1</sup> A bill will lie by one partner against his copartner and a third party to enforce the production and cancellation of a note fraudulently given by such partner to the third party, who had knowledge of the fraud. *Fuller v. Percival*, 126 Mass. 381.

A bill will not lie, however, to

compel the third party to pay, take up and cancel the note, where it has been sold by him to an innocent holder for value. *Fuller v. Percival*, 126 Mass. 381.

(*c*) *Read v. Bowers*, 4 Bro. C. C. 441.

(*d*) *Taylor v. Davis*, 3 Beav. 388, note; *Greatrex v. Greatrex*, 1 De G. & Sm. 692; *Charlton v. Poulter*, 19 Ves. 148, n.

(*e*) See *Marshall v. Watson*, 25 Beav. 501, where an injunction to restrain a partner from publishing the accounts of the firm was under special circumstances refused. See, also, as to making slanderous statements and diverting letters, *Hermann Loog v. Bean*, 26 Ch. D. 306, a case of agency, but applicable to partnerships.

ing the share of a late copartner, by reason of his death or bankruptcy, or under an execution. (*f*)

**Injunction to enforce special agreements.**— So after a dissolution the court constantly interferes by injunction to restrain breaches of special agreements entered into between the partners; such, for example, as agreements \*not to carry on business, (*g*) not to get in debts of [\*543] the firm, (*h*) not to divulge a trade secret. (*i*) So, if a partner retires, and assigns his interest in the partnership, and in the good-will thereof, to the continuing partners, he will be restrained from recommencing or carrying on business in such a way as to lead people to suppose that he is the successor of or still connected with the old firm. (*k*)

**Injunction to restrain actions on the ground of unsettled accounts.**— Although injunctions to restrain actions are now abolished,<sup>1</sup> it may be useful to observe that where surviving partners gave the executors of their late partner a bond for the amount of his share, the amount of which had not been ascertained, an action on the bond was stayed on its being shown that if the partnership accounts were taken, it would appear that the surviving partners had already paid too much. (*l*) But an action for the balance

(*f*) See as to assignees in bankruptcy, *Allen v. Kilbre*, 4 Madd. 464; *Fraser v. Kershaw*, 2 K. & J. 496; *Davidson v. Napier*, 1 Sim. 297; *Freeland v. Stansfeld*, 2 Sm. & G. 479. As to sheriffs, *Bevan v. Lewis*, 1 Sim. 376; *Newell v. Townsend*, id. 419, and *ante*, p. 356 *et seq.* As to executors, *Phillips v. Atkinson*, 2 Bro. C. C. 272.

(*g*) *Whittaker v. Howe*, 3 Beav. 383.

(*h*) *Davis v. Amer*, 3 Drew. 64.

(*i*) *Morison v. Moat*, 9 Ha. 241.

(*k*) *Churton v. Douglass*, Johns. 174, *ante*, p. 441. See, also, *Hookham v. Pottage*, 8 Ch. 91, and *Hermann Loog v. Bean*, 26 Ch. D.

306, as to making injurious statements.

<sup>1</sup> In a suit between partners for the settlement of the partnership affairs, the court of equity does not get such control of the assets as to enable it to prevent firm creditors from proceeding at law to judgment, execution and levy upon the assets, until after decree of dissolution providing for calling in the creditors and some creditors have come in. *Ross v. Titsworth*, 37 N. J. Eq. 333.

(*l*) *Jackson v. Sedgwick*, 1 Swanst. 460. See, also, *Gold v. Canham*, 1 Ch. Ca. 311, and 2 Swanst. 325, note.

of a settled account would not be restrained merely because there were other unsettled accounts between the parties; (*m*) nor would a court of equity interfere to prevent a shareholder of a company who was a creditor of that company from executing a judgment obtained against it by him as creditor. (*n*)

**Injunction in case of misconduct.**—Before leaving this subject it is necessary to make a few observations on the kind of misconduct which will induce the court to grant an injunction against one partner at the suit of another. Mere squabbles and improprieties, arising from infirmities of temper, are not considered sufficient ground for an injunction; (*o*) but if one partner excludes his copartner from his rightful interference in the management of the partnership affairs, or if he persists in acting in violation of the [\*544] \*partnership articles on any point of importance, or so grossly misconducts himself as to render it impossible for the business to be carried on in a proper manner, the court will interfere for the protection of the other partners. (*p*)<sup>1</sup> Where, however, the partner complained of has by agreement been constituted the active managing partner, the court will not interfere with him unless a strong case be made out against him; (*q*) nor will the court restrain a partner from acting as such merely because, if he is known

(*m*) See *Preston v. Strutton*, 1 Ans. 50, and *Rawson v. Samuel*, Cr. & Ph. 172.

(*n*) *Rheam v. Smith*, 2 Ph. 726; *Hardinge v. Webster*, 1 Dr. & Sm. 101. And see *Hammond v. Ward*, 3 Drew. 103.

(*o*) See *Marshall v. Colman*, 2 J. & W. 266; *Smith v. Jeyes*, 4 Beav. 503; *Lawson v. Morgan*, 1 Price, 307; *Cofton v. Horner*, 5 Price, 537; *Warder v. Stilwell*, 3 Jur. N. S. 9.

(*p*) See *post*, book iv, ch. 1, § 2. In *Anderson v. Wallace*, 2 Moll. 540, one of several partners who

horsed a mail coach was restrained from horsing it on the ground that he did it so badly as to imperil the business of the concern.

<sup>1</sup> One partner may be restrained from a course injurious to the rights of another or depriving him of his due share in the direction of the business. *Tillar v. Cook*, 77 Va. 477.

(*q*) See *Lawson v. Morgan*, 1 Price, 303; *Waters v. Taylor*, 15 Ves. 10. See, also, *Walker v. Hirsch*, 27 Ch. D. 460.



so to do, the confidence placed in the firm by the public will be shaken. (r)

**Partner applying for injunction must come with clean hands.**—It need scarcely be observed that a partner who seeks an injunction against his copartner must himself be able and willing to perform his own part of any agreement which he seeks to restrain his copartner from breaking; (s) and the plaintiff's own misconduct may be a complete bar to his application, however wrong the defendant's conduct may have been. (t) As stated by Lord Eldon in *Const v. Harris*, a partner who complains that his copartners do not do their duty to him must be ready at all times, and offer to do his duty to them. (u)

**Injunction to restrain holding out.**—In consequence of the liability which attaches to a person who holds himself out as a partner with others, and of the danger run by a person who is held out as a partner with others, even although it may not be with his consent, a court will, it seems, interfere and restrain a person from holding out another as partner with him, without the authority of that other. (x)

### \*3. *Of receivers.*

[\*545]

**Object of having a receiver and manager.**—The object of having a receiver appointed by the court is to place the partnership assets under the protection of the court, and to prevent everybody except the officer of the court from in any way intermeddling with them. The object of having a manager is to have the partnership business carried on

(r) *Anon.* 2 K. & J. 441.

(s) *Smith v. Fromont*, 2 Swanst. 330.

(t) *Littlewood v. Caldwell*, 11 Price, 97, where an injunction was refused because the plaintiff had taken away the partnership books.

(u) *Const v. Harris*, T. & R. 524.

(x) See *Routh v. Webster*, 10 Beav.

561; *Bullock v. Chapman*, 2 De G. & Sm. 211; *Troughton v. Hunter*, 18 Beav. 470. Compare *Banks v. Gibson*, 34 Beav. 566. In *Dixon v. Holden*, 7 Eq. 488, an injunction was granted to restrain the publication of a statement that the plaintiff was a member of a bankrupt firm.

under the direction of the court; a receiver, unless he is also appointed manager, has no power to carry on the business.<sup>1</sup>

**Receivers in actions not seeking a dissolution — Receiver and manager.**— Courts of justice are by no means anxious to take upon themselves the management of a partnership business, and they will, it is said, never do so, save with a view to a dissolution or final winding up of the affairs of the concern. In the well known case of *Const v. Harris*, (y) Lord Eldon intimated that a receiver might be appointed in a suit where a decree could be made for carrying on the concern according to some specific agreement between the parties, as well as in a suit for a dissolution and winding up; and in that very case a receiver was appointed although no dissolution was prayed by the bill.<sup>2</sup>

<sup>1</sup> Where the receiver of firm property has assets in his hands which are shown to belong to the individual partners, an order will be made that they be restored to them. *Saylor v. Mockbie*, 9 Iowa, 209; *Gorham v. Farson*, 10 N. E. Rep. 1; S. C. 8 West. Rep. 697.

The receiver of a partnership may be charged as trustee of one partner for moneys belonging to him remaining in his hands after the termination of the proceedings. *Willard v. Decatur*, 59 N. H. 137.

On filing a bill for the dissolution of the firm and the appointment of a receiver, injunction prohibiting one of the defendants from carrying on business with his own property is improper. *Pratt v. Underwood*, 4 N. Y. Civ. Proc. 167.

A receiver of a firm may, under the order of a court, take possession of all firm assets, and collect all debts due the firm, but his authority is confined to what are properly firm assets; and when an

action could not have been maintained by the firm one cannot be maintained by the receiver, except where the firm has been guilty of fraud against its creditors. The individual liability of a member of a partnership to the firm creditors is not an asset of the firm; and in the absence of a statute authorizing the receiver of a partnership to enforce such liability in behalf of the creditors, he has no such power, and the right of action is in the creditors themselves. *Wallace v. Mulligan*, 110 Ind. 498.

On a bill in equity to wind up a partnership a receiver will not be appointed to take possession of its assets in a foreign jurisdiction. *Harvey v. Varney*, 104 Mass. 436.

(y) *Turn. & R.* 517. See, further, as to managers as distinguished from receivers, *Gardner v. Lond. Chat. and Dover Rail. Co.* 2 Ch. 201; *Re Manchester and Milford Rail. Co.* 14 Ch. D. 653.

<sup>2</sup> It is only in exceptional cases

The receiver there appointed was, however, in no sense a manager, but merely a person nominated to receive money coming in from certain quarters, and to apply it in the manner agreed upon in the partnership articles. If the appointment of a receiver does not involve the appointment of a manager *Const v. Harris* is a clear authority to show that a receiver may be obtained in an action not seeking a dissolution of the partnership; the later cases are not opposed to this. But the writer is not aware of any instance in which an action or suit has been instituted for the purpose of continuing a partnership, and in which the court has appointed a receiver and manager; and in *Hall v. Hall* (2) Lord Cottenham decided that in such a suit no such appointment could be made. *Roberts v. Eberhardt* (a) is to the same effect. There the \*plaintiff and the defend- [\*546] ants were partners in a colliery, the plaintiff being the managing partner. Disputes arose between the plaintiff and the defendant, and the former filed a bill for an account and a receiver, but did not ask for a dissolution. The vice-chancellor, on a motion by the plaintiff for a receiver, refused the motion on the ground that the object of the suit was to insure a continuance of the partnership and not to bring it to a close. As was said by Lord Eldon, the court will not, by appointing receivers, take upon itself the management of every trade in the kingdom; nor will it take upon itself the management of *any* partnership business, save with a view to its final winding up. (b)<sup>1</sup>

that a receiver for a partnership will be appointed, unless a dissolution has already occurred or is about to occur. *Barnes v. Jones*, 99 Ind. 161.

(z) 3 Mac. & G. 79.

(a) Kay, 148.

(b) See *Goodman v. Whitcomb*, 1 Jac. & W. 589; *Harrison v. Armistage*, 4 Madd. 143; *Hall v. Hall*, 3 Mac. & G. 79; *Smith v. Jeyes*, 4 Beav. 503; *Waters v. Taylor*, 15

Ves. 10; *Oliver v. Hamilton*, 2 Anstr. 453. In *Morris v. Colman*, 18 Ves. 438, there was a reference for the appointment of a manager.

<sup>1</sup>A receiver will be appointed only with a view to a dissolution and winding up. Receivers are not appointed to carry on and manage the business of a partnership. *Waterbury v. Express Co.* 50 Barb. 157; *S. C.* 3 Abb. Pr. N. S. 163; *Garetson v. Weaver*, 3 Edw. Ch. 385.

The Judicature Act, 1873 (sec. 25, cl. 8), may perhaps render it easier than formerly to obtain a receiver in partnership actions; but this has not yet been decided.

**Receiver not refused because no dissolution is prayed.—**

It is not, however, necessary, in order to induce the court to interfere, that the plaintiff should in his action expressly ask for a dissolution; for the court will entertain an application for a receiver if the object of the action is to wind up the partnership affairs, and the appointment of a receiver and manager is sought with that view. Thus, in *Sheppard v. Oxenford*, (c) which has been already referred to, the court granted an injunction and appointed a receiver and manager. (d) No dissolution was expressly asked for, but the whole object of the suit evidently was to wind up the company, and have its assets applied in liquidation of its liabilities.

Again, in *Evans v. Coventry*, (e) the members of two societies, or rather it would seem of one society, having two branches of \*business, viz., a loan branch, and an insurance branch, filed a bill for the purpose of having the funds of the societies made good by the defaulting directors, and of having the accounts investigated, the affairs of the societies wound up if necessary, and their assets in the meantime protected by the appointment of a manager and receiver. It was proved that some of the funds had already been made away with by the secretary; and a manager and receiver was appointed to protect what remained until the hearing of the cause, upon the ground

(c) 1 K. & J. 491, *ante*, pp. 499, 500.

(d) A receiver and manager was appointed in this country, and the defendant, who had gone to the Brazils after the bill had been filed, was appointed receiver and manager out there.

(e) 5 De G. M. & G. 911, reversing S. C. 3 Drew. 75. It does not

appear very distinctly what the manager, as distinguished from the receiver, was expected to do. The vice-chancellor refused the motion mainly upon the ground that he could not take upon himself the management of such societies, even until the hearing of the cause. The court of appeal did not allude to this.

that the plaintiffs had an interest in the funds in question, and that those funds were in danger of being lost.

**Difference between granting an injunction and appointing a receiver.**—It has been already remarked that in granting or refusing an order for a receiver the court does not act on the same principles as when it grants or refuses an order for an injunction; it being one thing to manage the affairs of a partnership oneself, and another to prevent a person, who has already misconducted himself, from interfering further with the partnership concerns. (*f*) Another reason for drawing a distinction between an injunction and a receiver is that, whilst an injunction excludes only the person against whom it is granted, the appointment of a receiver excludes *all* the partners from taking part in the management of the concern. It therefore does not follow that, because the court will grant an injunction, it will also appoint a receiver; nor that, because it refuses to appoint a receiver, it will also decline to interfere by injunction. (*g*)

**Right to a receiver.**—In considering the right to the appointment of a receiver in actions for a dissolution or winding up it is necessary to distinguish cases in which there is a contest between partners, or late partners, from those in which the contest is between partners or late partners on the one side, and non-partners on the other.

**1. As between partners after a dissolution.**—Where one partner seeks to have a receiver appointed against his co-partners the first thing to ascertain is whether the partnership between them is still subsisting or has been already dissolved; for if it is still subsisting no receiver will be appointed unless some special grounds for the appointment \*can be shown, (*h*) or unless it is plain [\*548]

(*f*) See *Hall v. Hall*, 3 Mac. & Hartz *v. Schrader*, 8 Ves. 317; G. 85; and *ante*, p. 539. *Hall v. Hall*, 12 Beav. 414, and 3

(*g*) Although an injunction was Mac. & G. 79.  
granted a receiver was refused in (*h*) See *infra*, p. 550.  
*Read v. Bowers*, 4 Bro. C. C. 441;

that an order for a dissolution will be made; (2) whilst if the partnership is already dissolved the court usually appoints a receiver almost as a matter of course. (3)<sup>1</sup> In the

(2) *Goodman v. Whitcomb*, 1 Jac. & W. 592.

(3) See the last note, and *Thomson v. Anderson*, 9 Eq. 533; *Sargant v. Read*, 1 Ch. D. 600, where both plaintiff and defendant applied for a receiver. But see *per Lord Eldon* in *Harding v. Glover*, 18 Ves. 281, in which he disavowed the principle that a dissolution was a sufficient ground for a receiver.

<sup>1</sup> A partner who enjoins his associate from collecting partnership assets is bound to see that a receiver is promptly appointed to take charge of the effects impounded by the writ, and to secure them by proper legal proceedings. He is liable for all loss occasioned by the neglect of the receiver to do his duty in realizing the assets, or for accounting for them after they are realized; but it will be otherwise as to loss occasioned by the insolvency of the receiver if his adversary consented to his appointment without security. *Terrell v. Ingersoll*, 10 Lea (Tenn.), 77.

Wilful acts of fraud by one or more partners, the application by them of partnership funds to their own uses, making of false entries on the books, preventing another person from having access to such books, and the wilful concealment from him of the condition of the partnership business, furnish sufficient ground for a dissolution and the appointment of a receiver *pendente lite*. *Barnes v. Jones*, 91 Ind. 161; *Shannon v. Wight*, 60 Md. 520.

Where a partnership has expired

by limitation, and neither party desires to continue business, a receiver will not, on the application of one, be appointed to settle partnership affairs in the absence of any showing of improper conduct on the part of the person against whom the relief is sought. *Bufkin v. Boyce*, 104 Ind. 53.

Where the members of a limited partnership association, under the act of 1874, are not satisfied with the business policy of the managers, the remedy is to elect new managers; it is not ground for the appointment of a receiver. *Patterson v. Tidewater Pipe Co.* 12 Weekly Not. Cas. 452.

Where partners disagree in such a manner as to render the further prosecution of their partnership business practically impossible, appointment of receiver is proper. *Pratt v. Underwood*, 4 N. Y. Civ. Proc. 167.

Where partnership property has been sequestered by one partner to prevent devastation and irreparable injury by the other, and the property remains in judicial custody, this other partner cannot have this sequestration set aside on bond, under article 279 of the Civil Code of Practice. *State v. Judge*, 38 La. Ann. 49.

When a partnership is dissolved by decree the court will appoint a receiver, upon a disagreement between partners, in the course of the winding up; and the same rule must apply when a dissolution has taken place by consent or otherwise, and a serious disagree-

case supposed the common property has to be applied in paying the partnership debts and has to be divided amongst the partners, and each partner has as much right as the others to wind up the partnership affairs. Their position is, therefore, essentially different from that of mere co-owners, between whom courts decline to interfere by appointing a receiver, except under special circumstances. (*l*)

**2. As between partners and non-partners.**—When the contest as to a receiver arises between a partner on the one hand, and the executors, administrators or assigns of a late copartner on the other, the first thing to be considered is whether the person sought to be excluded from interference is a partner or not. For whilst the court is reluctant to exclude a partner from the management of the partnership affairs, it will readily interfere to prevent other persons from intermeddling therewith. The reason given for this is that each partner is at the outset trusted by his copartners and has confidence reposed by them in him; and until it can be shown that he ought not to be allowed to take part any longer in the management of the partnership affairs, the court will not interfere with him. But this reasoning has no application to persons who acquire an interest in the partnership assets by events over which the

ment arises afterwards. *Richards v. Baurman*, 65 N. C. 162.

Where the pleadings showed that the parties to a bill in equity were copartners equally interested in the property and business of the firm, and by the articles no time was limited for the continuance of the partnership, and the bill alleged that it was dissolved by consent on December 31, 1862, which was denied by the answer; but it appeared that a dissolution was then contemplated and imminent, and that there was a serious and

irreconcilable disagreement between the parties both as to the control and disposition of their property and effects, and their respective claims and demands against each other, *held*, that the action of the circuit court in continuing an injunction granted by it, and appointing receivers, was a provident exercise of equity power, sanctioned by the authorities, and demanded by the exigencies of the case. *Whitman v. Robinson*, 21 Md. 30.

(*l*) See *ante*, p. 56 *et seq.*

partners have no control, *e. g.*, the death or bankruptcy of one of the members of the firm. Whilst, therefore, even in an action for a dissolution or winding up, a receiver will not be granted against a member of the firm at the instance of the executors, administrators or assigns of a late partner, unless some special grounds for the interference of the court can be established, (*m*) it is a matter [\*549] \*of course to appoint a receiver where all the partners are dead, and an action is pending between their representatives; (*n*) or where such appointment is sought by a partner against the representatives of his late copartner. (*o*)<sup>1</sup> *Fraser v. Kershaw* (*p*) is a good illustration of this doctrine. There one partner had become bankrupt; the share of the other partner had been taken in execution under a *f. fa.* for a separate debt, and had been assigned to his creditor by the sheriff. The creditor, as the assignee from the sheriff of all the share and interest of the non-bankrupt partner, claimed the right of winding up the affairs of the partnership, and to exclude the assignees of the bankrupt partner from interfering. But on a bill filed by them against the judgment creditor the court granted an injunction and appointed a receiver, holding that the right of the non-bankrupt partner to wind up the affairs of the partnership was personal to himself and was incapable of

(*m*) *Collins v. Young*, 1 Macqueen, 385. And see *Harding v. Glover*, 18 Ves. 281; *Kershaw v. Matthews*, 2 Russ. 62; *Kennedy v. Lee*, 3 Mer. 448; *Lawson v. Morgan*, 1 Price, 303. For similar reasons the court of probate will not appoint a receiver *pendente lite* against a surviving partner unless under very special circumstances. *Horrell v. Witts*, L. R. 1 Pr. & Div. 103.

(*n*) *Philips v. Atkinson*, 2 Bro. C. C. 272.

(*o*) *Freeland v. Stansfeld*, 2 Sm. & G. 479.

<sup>1</sup> As to when a receiver will be appointed and as to what property will be intrusted to him in a case where the intestate's partner was his administrator, and where such administrator died and in his turn an administrator was appointed who filed a bill for an accounting and settlement between the several estates, see *Perrin v. Lepper*, 56

Mich. 351.

(*p*) 2 K. & J. 496.



transfer, and did not, therefore, pass with his share and interest in the partnership assets. (q)<sup>1</sup>

**Influence of the number of partners on the appointment of a receiver.**—In those cases in which special grounds for the appointment of a receiver must be shown, it follows that in a firm of several members there is more difficulty in obtaining a receiver than in a firm of two.

(q) See, too, *Candler v. Candler*, Jac. 225, where a receiver was granted against the assignee of partnership debts.

<sup>1</sup> Where an insolvent firm offers by circular letter to pay its creditors fifty per cent. and to make no preference, and many of the creditors having accepted the offer the firm subsequently continues business at large expense, postpones the execution of the compromise indefinitely until all the creditors accept, and pays many of the debts in full, thereby making preferences, *held*, that equity has jurisdiction to put the assets in the hands of a receiver and administer them for the benefit of the creditors. *Fink v. Patterson*, 21 Fed. Rep. 602.

A receiver of a limited partnership may be appointed upon a bill filed by creditors. *Hillborn v. Covenant Pub. Co.* 12 Weekly Not. Cas. 548.

Account having been taken showing the different debts of the partnership, their amount and to whom due, how much each partner is to pay, the court may appoint a receiver to collect from each partner the amount he is to pay and apply the fund to pay the creditors. *Jordan v. Miller*, 75 Va. 442.

Where it is sought to reach the interest of a party in a partnership

the plaintiff has the burden of showing that the party is a member of the firm, and where such fact is not established the appointment of a receiver to determine his interest is error. *Dupuy v. Sheak*, 57 Ia. 361.

As to the rights of the receiver of partnership assets, appointed by the judgment dissolving the firm, to intervene in an action brought by a creditor against the firm, and as to the defenses, etc., which he may make, see *Honegger v. Wettstein*, 47 N. Y. Super. Ct. 125.

Where a firm conveys property to a trustee for the payment of certain firm debts a receiver may afterwards be appointed where there is a controversy as to the application of the proceeds of the property. *Naylor v. Sidener*, 106 Ind. 179.

Where, by an agreement between the partners and a third party, one of the parties assigns his interest to the third party, who by the agreement is to act with the other partner in settling the affairs of the firm, such assignee is entitled to an injunction and receiver to settle the affairs, in the same way as the retiring partner would have been had he not made the assignment. *Van Rensselaer v. Emery*, 9 How. Pr. 135. See, also, *Kirby v. Ingersoll*, 1 Doug. 477.

For the appointment of a receiver, operating in fact as an injunction against *all* the members, there must be some ground for excluding all who oppose the application. If the object is to exclude some or one only from intermeddling, the appropriate remedy is rather by an injunction than by a receiver. (*r*)

**Defendant now entitled to a receiver.**— Before the Judicature Acts it was not the practice to appoint a receiver at the instance of a defendant before decree. (*s*) If [\*550] \*he desired to apply for a receiver before decree he had to file a cross-bill. But this is now unnecessary. (*t*)

**Grounds for the appointment of a receiver against a partner.**— The grounds on which the court is usually asked to appoint a receiver before dissolution are either because, by agreement, the partners have divested themselves more or less of their right to wind up the affairs of the concern, or because, by misconduct, the right of personal intervention has been forfeited, and the partnership funds are in danger of being lost.

**Agreement.**— As an illustration of an appointment of a receiver, grounded on an express agreement, reference may be made to *Davis v. Amer.* (*u*) There the plaintiff and the defendant, on dissolving partnership, appointed a stranger to get in the assets of the firm and agreed not to interfere with him. After this agreement had been partially acted on one of the partners died, and, disputes arising between the executors of the deceased partner and the surviving partner, the latter proceeded to get in the debts of the firm in violation of the agreement. On a bill filed by the executors of the deceased partner for an account, and for an

(*r*) See *Hall v. Hall*, 3 Mac. & G. 79.

(*s*) *Robinson v. Hadley*, 11 Beav. 614.

(*t*) See Ord. xix, r. 3, and Ord. l, r. 6; *Sargant v. Read*, 1 Ch. D. 600.

(*u*) 3 Drew. 64. See, too, *Turner v. Major*, 3 Giff. 442, a somewhat similar case. No receiver, however, appears to have been appointed.

An injunction was sufficient.

injunction and a receiver, the court, on motion, appointed a receiver, but declined to grant an express injunction, on the ground that there was no sufficient impropriety of conduct on the part of the defendant to render such an order necessary. (x)<sup>1</sup>

**Misconduct.**—With respect to misconduct, the observations which have been already made on this head when speaking of injunctions might be here repeated. (y) If the partnership is not yet dissolved, (z) there must be something more than a partnership squabble; the due winding up of the affairs of the concern must be endangered to induce the court to appoint a receiver of its assets; and non-cooperation of one partner, whereby the whole responsibility of management is thrown on his copartner, is not sufficient. (a)

**\*Receiver appointed.**—Where, however, a partner has so misconducted himself as to show that he is no longer to be trusted, as, for example, if one partner colludes with the debtors of the firm, and allows them to delay paying their debts; (b) or carries on trade on his own account with the partnership property; (c) or, the partner-

(x) See *ante*, p. 539, note (c).

<sup>1</sup> See *ante*, note. Where two general partners, A. and B., sign an agreement at the dissolution of the firm that B. shall settle the affairs of the firm, and use the firm's name in so doing, and the agreement is published, and was intended for publication, this is evidence of an agreement that B. alone was authorized to settle the affairs of the partnership. An assignment was made by B. for the benefit of the firm's creditors after this arrangement, and while A. was present, but without his knowledge. A. applied thereupon for a receiver, but alleged no fraud or bad conduct in the assignee, and the an-

swer to his bill insisting strongly on the solvency of the firm. *Held*, that the application should be denied, and that the court would not interfere with the agreement of the partners. *Hayes v. Heyer*, 4 Sandf. Ch. 485.

(y) *Ante*, p. 543.

(z) See *ante*, p. 548, as to dissolved partnerships.

(a) See *Roberts v. Eberhardt*, Kay, 148, and *Rowe v. Wood*, 2 J. & W. 556, where one partner declined to advance more money to work a mine.

(b) *Estwick v. Conningsby*, 1 Vern. 118.

(c) *Harding v. Glover*, 18 Ves. 281.

ship property being abroad, runs off in order to do what he likes with it there; (*d*) or, if a surviving partner insists on carrying on the business, and employing therein the assets of his deceased partner; (*e*) or if there is such mismanagement as endangers the whole concern; (*f*) or if the persons having the control of the partnership assets have already made away with some of them; (*g*) in all these cases the court will interfere by appointing a receiver. (*h*)<sup>1</sup>

(*d*) Sheppard *v.* Oxenford, 1 K. & J. 491.

(*e*) Madgwick *v.* Wimble, 6 Beav. 495.

(*f*) See *De Tastet v. Bordieu*, cited in a note in 2 Bro. C. C. 272. But see *Const v. Harris, T. & R.* 524.

(*g*) *Evans v. Coventry*, 5 De G. M. & G. 911.

(*h*) See *Smith v. Jeyes*, 4 Beav. 503.

<sup>1</sup> A receiver may be appointed to take charge of partnership property, where the firm or one partner has become insolvent, and a partner, or in the latter case the insolvent partner, is wasting the property, or threatens to make an improper application of it. *Williamson v. Wilson*, 1 Bland, 418; *Renton v. Chaplain*, 9 N. J. Eq. 62; *Birddall v. Colie*, 11 N. J. Eq. 63; *Willson v. Ficher*, 12 N. J. Eq. 71; *Cox v. Peters*, 13 N. J. Eq. 39; *Deveau v. Fowler*, 2 Paige, 400; *Evans v. Evans*, 9 id. 178; *Jacquin v. Buisson*, 11 How. Pr. 385; *Geortner v. Trustees, etc.* 2 Barb. 625; *Ellis v. Commander*, 1 Strobb. Eq. 188; *Phillips v. Trezevant*, 67 N. C. 370; *Boyce v. Burchard*, 21 Ga. 74.

A partner having possession of all the partnership effects has no ground for an application for the appointment of a receiver of the

partnership property, he having full power to dispose of it. *Smith v. Lowe*, 1 Edw. 33.

A partnership was entered into for a special purpose, to wit, the delivery of forty thousand feet of plank stocks at a certain place. Subsequently the partnership was dissolved, the defendant agreeing to pay the plaintiff for his interest in the timber at certain rates specified in the contract of dissolution. A bill was then filed to set aside this contract of dissolution, on the ground of fraud, and praying for an injunction and the appointment of a receiver. Upon the motion to dissolve the injunction, *held*, that in case where a partnership still subsists, to authorize either party to apply for an injunction and the appointment of a receiver he must be prepared to show a case of great abuse or strong misconduct. *O'Bryan v. Gibbons*, 2 Md. Ch. 9.

A bill alleging substantially that the complainant had bought the interest of H. in the newspaper publishing firm of B. & H.; that B. had collected debts due the firm and was wasting the proceeds; that owing to personal and political differences, etc., irreparable mischief would be done if B. retained the management, etc., sets

**Effect of fraud by a partner.**—Again, the reluctance of the court in appointing a receiver against a partner, being

forth just grounds for an injunction and the appointment of a receiver. The legal effect of the sale was, *ipso facto*, a dissolution of the partnership between B. & H. Ballard *v.* Callison, 4 W. Va. 326.

Where, upon the dissolution of a partnership, its members form new firms, under an agreement to apply the partnership assets in their hands to the payment of the debts of the old partnership, and one of the firms converts to their own use or misappropriates such assets, or their conduct induces the conclusion that they have been or are likely to be untrue to the trust so reposed in them, the court will take the partnership assets out of their hands and place them in those of a receiver. But in such case there must be evidence of bad faith on the part of such firm before the court will appoint a receiver; mere loss of confidence in them is not sufficient. Coddington *v.* Tappan, 26 N. J. Eq. 141.

A receiver appointed to take possession of the property of a husband who has absconded with a paramour has no right to dispossess the other partner of the firm, of which the husband was a member, of the partnership property, in the absence of any averments of the waste and fraud committed, or about to be committed, by such partner, to the loss of the absconding member or his legal representatives. Hamill *v.* Hamill, 27 Md. 679.

If a surviving partner mixes the firm goods and their proceeds with his own and keeps no accounts

whereby they may be distinguished, the administrator may have a receiver unless the survivor will give security. Jennings *v.* Chandler, 10 Wis. 21.

Where it appeared that a copartnership was insolvent, and that the complainants, who were members, were excluded from their full share in the management of the concern, and that the respondent, who was the acting partner, neglected to keep proper books of account, and to keep them open for the inspection of the complainants, who were refused access to them, the court, on motion, appointed a receiver before answer and final decree, and on final hearing decreed a dissolution. Gowan *v.* Jeffries, 2 Ashm. 296.

Where a partner complainant does not show by his bill that the partner defendant is disposing of the effects of the firm in opposition to his express wishes or views, or that by himself, agent or attorney he has proposed to take part in the collection and application of these effects, and has been prevented by the defendant, or that the defendant has offered any opposition to him, and the answer denies that the defendant is proceeding against the rights or contrary to the interests of the complainant, or that the latter has made any demand upon him for any of the property of the firm or his individual property, a court of equity will not appoint a receiver to wind up the business. Terrell *v.* Goddard, 18 Ga. 664.

The bill stated that the plaintiff

based on the confidence originally reposed in him, that reluctance disappears if it can be shown that such confidence was originally misplaced. Therefore, where a defendant, by false and fraudulent representations, induced the plaintiff to enter into partnership with him, and the plaintiff soon afterwards filed a bill praying that the partnership might be declared void, and for a receiver, the court on motion ordered that a receiver should be appointed. (i)

**Effect of excluding a partner.**—Moreover, even although there be no misconduct jeopardizing the partnership assets, the court will appoint a receiver if the defendant wrongfully excludes his copartner from the management

agreed with A. to form a partnership in manufacturing, and that, after the partnership had continued several years, the said A. excluded him from taking any part in the business, and refused to give him any information as to the sales and collections, etc., and prayed a dissolution and the appointment of a receiver, the bill not charging that the plaintiff was unable to respond. The answer denied the exclusion; stated that the parties had recently had a settlement, when the plaintiff acknowledged he was indebted to the defendant to the amount of \$609.92 over and above \$400, secured by a mortgage; and that the plaintiff's share of the net profits since the settlement was not sufficient to pay said note. The defendant gave an account of his sales and collections, stated that he always had been and now was ready to account, and denied any design to act unfairly. *Held*, that the plaintiff was not entitled to a receiver. *Parkhurst v. Muir*, 7 N. J. Eq. 307.

§ 8), a special partner is liable, in case the assets of the partnership are insufficient to pay the debts, only for the amount withdrawn by him; and he cannot maintain a bill in equity against his general partner for the appointment of a receiver if the bill does not allege that the assets of the partnership are insufficient to pay the debts, or that the conduct of the general partner in settling the affairs of the partnership is such that there is danger of insolvency. *Snyder v. Leland*, 127 Mass. 291.

Where the security of an administrator of a deceased partner who purchased the firm assets, and bound himself to pay the firm debts, and who has died leaving firm debts unpaid and firm assets, is not sufficient, the court may appoint a receiver to receive from said administrator the partnership assets in his hands, and to proceed to collect the same. *Shackleford v. Shackleford*, 32 Grat. 481.

(i) See *Ex parte Broome*, 1 Rose,

Under General Statutes (ch. 55, 69.

of the partnership affairs. (*k*)<sup>1</sup> This doctrine is acted on where the defendant unsuccessfully contends that the plaintiff is not a partner, (*l*) or that he has no interest in the partnership assets. (*m*)

**\*Disputed partnership.**—Where a partnership is [\*552] alleged on the one side and denied on the other, and a motion is made for a receiver, the court usually declines to appoint a receiver until that question is determined. (*n*)<sup>2</sup>

(*k*) See *Wilson v. Greenwood*, 1 Swanst. 481; and *Goodman v. Whitcomb*, 1 J. & W. 589.

<sup>1</sup>See *ante*, note; *Gowan v. Jeffries*, 2 Ashm. 296; *Wolbert v. Harris*, 7 N. J. Eq. 605. See, however, *Petit v. Chevelier*, 13 N. J. Eq. 181.

(*l*) *Peacock v. Peacock*, 16 Ves. 49; *Blakeney v. Dufaur*, 15 Beav. 40.

(*m*) *Wilson v. Greenwood*, 1 Swanst. 471, where the plaintiffs were the assignees of a bankrupt partner. See, too, *Clegg v. Fishwick*, 1 Mac. & G. 294, where the plaintiff was the administratrix of a deceased partner.

(*n*) *Peacock v. Peacock*, 16 Ves. 49; *Chapman v. Beach*, 1 J. & W. 594; *Fairburn v. Pearson*, 2 Mac. & G. 144. See *Rock v. Mathews*, 2 De G. & Sm. 227, as to the conclusiveness, upon a motion for a receiver, of an answer denying the partnership alleged by the bill.

<sup>2</sup>See *Baxter v. Buchanan*, 3 Brewst. 435; *Morey v. Grant*, 48 Mich. 326; *Goulding v. Bain*, 4 Sandf. 716; *Williamson v. Munroe*, 3 Cal. 383; *Semple v. Flynn*, 8 Cent. Rep. (N. J.) 549.

In an action for the settlement of partnership affairs it is proper for the court upon a positive denial of the partnership, and upon its

being made to appear that a very small proportion, if any, of the capital was contributed by the plaintiff, and that by the injunction and receivership a large and flourishing business will be arrested and perhaps ruined, to rescind the order for injunction and receivership granted in the first instance, upon the defendants' giving adequate security to pay the plaintiff any sum that may be found due to him on final settlement. *Popper v. Schieder*, 7 Abb. Pr. N. S. 56; 38 How. Pr. 34. See, also, *Dunham v. Jarvis*, 8 Barb. 88.

An allegation in a bill in equity that one defendant claims to have been in partnership with a party deceased, that the other defendant, the administratrix of said deceased, denies such partnership, and that the complainant himself is ignorant of the state of the case, is not "an averment of partnership" sufficient to authorize the issuing of orders for an injunction and the appointment of a receiver. *Guyton v. Flack*, 7 Md. 398.

An unexecuted agreement of partnership will not entitle one of the parties to the appointment of a receiver to wind up the affairs of the concern. *Hobart v. Ballard*, 31 Iowa, 521.

**Illegality of partnership.**—Some difficulty occurs where the defendant relies on illegality as a defense to the action against him. If the illegality is established the court cannot, it is conceived, interfere. But if a receiver is applied for before the trial of the action, and the court is not satisfied that no relief can ultimately be given, it will appoint a receiver to protect the property *pendente lite*, and the character of the defense will go far to remove any scruples the court might otherwise have in interfering. Thus, in *Hale v. Hale*, (o) the plaintiff and the defendant had carried on the business of brewers for many years in partnership together. The plaintiff filed a bill for a dissolution, and the defendant then denied the plaintiff's right to any account or relief whatever, on the ground that the partnership was illegal. Having thus set the plaintiff at defiance, and claimed the whole property himself, Lord Langdale, on that ground alone, appointed a receiver and manager, although the plaintiff was only a dormant partner, and the defendant's management of the business was in no way complained of.

**Receivers of mines.**—In mining partnerships a receiver will be appointed or refused upon the same principles as in other partnerships. Accordingly, if no dissolution or winding up is sought, a receiver and manager will not be appointed; (p) but with a view to a dissolution or winding up, a receiver and manager will be appointed if there are any such grounds for the appointment as are sufficient in other cases; (q) or if the partners \*cannot agree as to the proper mode of working the mines until they are sold. (r) In *Rowe v. Wood*, (s) indeed, a re-

(o) 4 Beav. 369. See, too, *Sheppard v. Oxenford*, 1 K. & J. 491, and *Williams v. Rowlands*, 30 Beav. 302, noticed below.

where a receiver was appointed (q) *Sheppard v. Oxenford*, 1 K. & J. 491, where there was no prayer although the legality of the partnership was denied. for a dissolution.

(p) *Roberts v. Eberhardt*, Kay, 148. And see *Rowlands v. Evans*, 298; *Jefferys v. Smith*, 1 J. & W. 398; *Lees v. Jones*, 3 Jur. N. S.

(s) 2 J. & W. 553.



ceiver was refused although one of the partners excluded the other from interfering with the mine; but this was a peculiar case, for the partner complained of was not only a partner, but also a mortgagee in possession, and his mortgage debt was still unsatisfied. Again in *Norway v. Rowe*, (t) although the plaintiff was excluded, a receiver was refused on the ground of his laches, he having been excluded for some time and having taken no steps to assert his rights until the mine proved profitable. (u)

**Lunacy.**— In *Rowlands v. Evans*, and *Williams v. Rowlands*, (x) it was held that a manager could not be appointed to carry on a mine for the benefit of a lunatic partner. The court ordered a sale and appointed an *interim* manager only.

**Appointment of partner to be receiver.**— If the court, on being applied to for the appointment of a receiver, thinks that a proper case for such appointment is made, and the partner actually carrying on the business has not been guilty of such misconduct as to have rendered it unsafe to trust him, the court generally appoints him receiver and manager without salary. (y)<sup>1</sup> It is usual, however, to re-

954. In this last case will be found a discussion as to what ought to be done if the mine is held on a lease, and cannot be sold without the lessor's consent, which is refused.

(t) 19 Ves. 159.

(u) See further on this matter, *ante*, p. 466 *et seq.*

(x) 30 Beav. 302.

(y) This was done in *Wilson v. Greenwood*, 1 Swanst. 471; *Blakey v. Dufaur*, 15 Beav. 40. See *Sargant v. Read*, 1 Ch. D. 600, where one of the plaintiffs, being senior partner, had liberty to propose himself, although it was urged that he would thereby obtain an unfair advantage as regarded the good-will.

<sup>1</sup> Where the parties have agreed

that one of their members shall manage and wind up the business, and he has been interfered with by one of them, it is entirely proper that he should be appointed managing receiver by the court. *Hanover Fire Ins. Co. v. Germania Fire Ins. Co.* 33 Hun (N. Y.), 539.

Where, by agreement, the charge of the books and the settlement of the business of the firm upon dissolution are expressly confided to one partner, the court will not take the matter thus confided to him out of his hands without the most cogent reasons — such as a clear breach of duty, conduct amounting to fraud, or facts showing a real danger to the partnership assets. *Hefebower v. Buck*, 64 Md. 15; *Hoffman v.*

quire him to give security duly to manage the partnership affairs, and to account for money received by him. (z) In other cases the appointment of a receiver is referred by the judge to his chief clerk, and leave is frequently given for each partner to propose himself. A partner who is appointed receiver becomes the officer of the court, and must act and be respected accordingly.

**Order appointing receiver.**—The order appointing [\*554] a receiver usually directs the partners \*to deliver up to him all the effects of the partnership, and all securities in their hands for the outstanding personal estate, together with all books and papers relating

Slembresser, 11 Weekly Not. Cas. 383.

Upon a bill for the dissolution of a partnership on account of the insanity of a partner, complainant partner is appointed receiver in *Reynolds v. Austin*, 4 Del. Ch. 24.

A partner, on dissolution of the partnership, appointed agent and receiver, although he have an interest, is only trustee for the other partners. *Honore v. Colmesnil*, 1 J. J. Marsh. 506.

A partner cannot under any plea personal to himself retain moneys collected by him as a receiver appointed by the court pending a suit for a partnership settlement. To retain such funds is a flagrant breach of trust, and the court may compel their immediate production. *Gridley v. Conner*, 2 La. Ann. 87.

The compensation of a receiver appointed to wind up the affairs of a dissolved partnership is to be limited to such an amount as will afford a reasonable compensation for the services required and rendered to a person of ordinary standing and ability, competent

for such services, and is not to be based upon the usages or rates of profits which prevail in any branch of business, nor upon the special qualifications or standing of the person appointed. *Grant v. Bryant*, 101 Mass. 567.

A receiver cannot claim credit in his account for attorneys' fees paid by him for either of the partners; but if upon final settlement there be sufficient funds in the court, belonging to the party for whom he has paid, the court may allow him to be reimbursed out of them. *Drake v. Thying*, 37 Ark. 228.

A receiver who suffered the good-will of the firm to be lost may be held to account for its value by a proceeding in the action for dissolution. *Mechanics' National Bk. v. Landauer*, 68 Wis. 44.

As to the fund from which the fees and expenses of the receiver shall be paid, see *Hopfensack v. Hopfensack*, 9 Daly, 457.

See, further, as to the fees and compensation of a receiver, *Weston v. Watts*, 45 Hun (N. Y.), 219.

(z) See the previous note.

thereto. The receiver is directed to get in the debts of the firm, and he is, if necessary, empowered to bring actions with the approbation of the judge; he is directed to pay the partnership debts, and to pass his accounts, and to pay balances in his hands into court. (a)<sup>1</sup>

With respect to the partnership books and papers, an order for their delivery will not be made if there is no necessity for it or if it would occasion inconvenience.<sup>2</sup> For

(a) See forms of order in *Seton* on Decrees, 414, ed. 4; *Wilson v. Greenwood*, 1 Swanst. 484; *Whitley v. Lowe*, 4 Jur. N. S. 815. The receiver here was appointed without opposition. See 4 Jur. N. S. 197, S. C.

<sup>1</sup> An order for a receiver in a partnership case should extend to all the partnership estate. *Morey v. Grant*, 48 Mich. 326.

A receiver of partnership assets may be appointed to collect and dispose of the same although one of the partners has died since the dissolution. *Martin v. Smith*, 53 N. Y. Super. Ct. 277.

A plaintiff, on whose application in an action for dissolution a receiver is appointed, may be compelled, on receiver's motion, to pay over to him collections made just prior to his application for such receiver. *Murphy v. DuBerg*, 11 Abb. N. Cas. 112.

<sup>2</sup> The books of a liquidating partnership are in the quasi-possession of the law and must be placed in the hands of the receiver in all circumstances. *Succession of Andrew*, 16 La. Ann. 197.

On an application that the executors file an inventory and give security for the due administration of the estate, a motion for an order that the executors deposit with the

surrogate the books of a copartnership composed of the deceased and one of the executors, so as to enable the next of kin to ascertain the amount of the interest of deceased in such copartnership, will not be granted. The surviving partner, being entitled to the custody of the books of the firm, ought not to be compelled to give them up. *Waring v. Waring*, 1 Redf. 205.

A receiver appointed for the settlement of partnership affairs at the suit of the personal representative of a deceased partner, with the power to collect all moneys and property of the firm, and to pay the debts of the firm, supersedes the surviving partner in the possession and control of the partnership effects and in the authority to settle up the partnership affairs. Such receiver is a necessary party to suits affecting the partnership property. *Kirkpatrick v. McElroy*, 41 N. J. Eq. 539.

The recovery of a judgment against partners after the appointment of a receiver to take charge of the firm assets for the benefit of the firm creditors generally creates no lien against the firm assets in receiver's hands. Such property cannot be levied on by execution or reached by garnishment. *Jack-*

example, in *Dacie v. John*, (b) the court declined to order a solicitor, who was the managing partner of a firm, to deliver up its books and documents to the receiver; for the receiver had free access to them all, and nothing more was considered necessary.

**Interfering with receiver.**—A receiver is an officer of the court, and any interference with him, or with property under his protection, amounts to a contempt of court and is punishable accordingly. (c) If a judgment creditor desires to levy execution on property in the custody of the receiver, special application should be made to the court in the action in which the receiver was appointed, and the court will direct the receiver to pay the judgment debt or make such other order as may be just. (d)

[\*555] \*4. *Of the sale of partnership property under the order of the court.*

**Conversion of partnership property — Agreements to avoid sale which cannot be carried out.**—It has been already seen that, in the absence of a special agreement to

son v. Lahee, 114 Ill. 287; *Knode v. Baldridge*, 73 Ind. 54.

Where a receiver has been appointed on a bill filed by one partner against his copartner, merely to hold the property pending a litigation, creditors of the firm are not bound to wait until the equities between the parties may be adjusted, but may proceed in a lawful way to acquire lien entitling them to priority over less diligent creditors. *Jackson v. Lahee*, 114 Ill. 287.

The receiver of a partnership need not be made a co-defendant in an action against partners on a firm debt contracted before his appointment unless he has a good defense thereto. *Seavey v. Jenkins*, 15 Weekly Not. Cas. 124.

(b) *McClell*. 206.

(c) See *Lane v. Sterne*, 3 Giff. 629, where a sheriff seized partnership property in the custody of a receiver. *Helmores v. Smith* (No. 2), 35 Ch. D. 449, where the interference was by advertisement. When an order for a receiver is made, a person is sometimes immediately put into possession; but until he is actually approved as receiver by the court, strangers to the action in which he is appointed are not guilty of contempt of court if they interfere with him. See *Defries v. Creed*, 6 N. R. 17.

(d) *Kewney v. Attrill*, 34 Ch. D. 345. See, as to interpleader at the instance of the sheriff, *ante*, pp. 358, note (q), and 362.

the contrary, the right of each partner (*e*) on a dissolution is to have the partnership property converted into money by a sale, (*f*)<sup>1</sup> even although a sale may not be necessary

(*e*) A person paid by a share of profits has no right to have them ascertained by a sale. See *Rishton v. Grissell*, 5 Eq. 326; *Walker v. Hirsch*, 27 Ch. D. 460. *Pawsey v. Armstrong*, 18 Ch. D. 698, went too far. See the last case.

(*f*) *Burdon v. Barkus*, 3 Giff. 412, and on appeal, 4 De G. F. & J. 42, where a purchase by one partner at a valuation was insisted on; *Rowlands v. Evans*, and *Williams v. Rowlands*, 30 Beav. 302, a case of lunacy. See, also, *Crawshay v. Collins*, 15 Ves. 227; *Crawshay v. Mauley*, 1 Swanst. 495; *Featherstonhaugh v. Fenwick*, 17 Ves. 298; *Hale v. Hale*, 4 Beav. 375. See *infra*, page 558, as to unsalable assets and pending contracts.

<sup>1</sup>See *Stevens v. Stevens*, 39 Conn. 474; *Dickinson v. Dickinson*, 29 id. 600; *Levi v. Karrich*, 8 Iowa, 150; *Sigourney v. Munn*, 7 Conn. 324; *Fillbrun v. Ivers*, 4 So. West. Rep. 674; *Johnson v. Mantz*, 69 Ia. 710. See, however, *Tomlinson v. Ward*, 2 Conn. 396.

In a settlement of a partnership in equity there ought, ordinarily, to be a sale of the firm property and an accounting for proceeds before there is a judgment for any difference due one partner from the other; but where no objection is made to a judgment without such sale, error will not be presumed on appeal, but rather an understanding that one of the partners should retain the property. *Johnson v. Mantz*, 69 Ia. 710.

The probate court has no power under section 2449 of the code to

order the sale of the deceased partner's interest in partnership lands before the firm debts have been paid and the partnership accounts settled. *Roulston v. Washington*, 79 Ala. 529.

It is within the discretion of the court, in decreeing a sale of partnership property, to include debts due to the firm, although it might have provided instead for their collection. *Hall v. Lonkey*, 57 Cal. 80.

A sale by a receiver in a suit for the settlement of partnership business, if confirmed by the court, gives the purchaser only so much interest in the property sold as the firm had, and does not divest or affect the paramount mortgage lien of a stranger to the record. *Lorch v. Aultman*, 75 Ind. 162.

Where, after a dissolution of a partnership, one of the late partners abandoned the partnership concerns, refused to divide the stock, and made no reply to the repeated solicitations of the other partner to come to an amicable settlement of their concerns; and where it appeared further that in this state, among merchants and traders, the customary mode of winding up the concerns of a solvent partnership, after a dissolution, is to divide the stock of goods on hand between the partners, or for one partner to purchase out the other; that there is no usage, in such cases, to sell the stock on hand at public auction; and that when this mode of sale has been resorted to it has been generally attended with considerable sacrifice

for the payment of debts. (g) This mode of ascertaining the value of the partnership effects is adopted by courts

or loss with reference to the appraised value; and where it appeared, also, that the partner in whose sole possession such goods were left, in order to render them more salable, replenished the stock with new and more salable goods, and so intermingled the old and new goods that it became impracticable for him to keep a separate account of the sales of the old stock—thus to replenish old stocks being generally practiced by regular merchants, and this being the only method that can be adopted with a prospect of making fair sales,—it was *held* that these circumstances did not deliver the case from the operation of the general rule, requiring a sale as the criterion of value. *Sigourney v. Munn*, 7 Conn. 324.

A court of equity has no power to decree the sale of a partner's interest in a firm brand or trademark. Such an interest is too intangible; before decreeing a sale of an alleged interest of a partner the court must be satisfied that the object or interest sought to be sold has some substantial tangible value. *Taylor v. Bemis*, 4 Biss. 406.

In an action between partners for a settlement of the copartnership affairs, and to recover a balance claimed by the plaintiff to be due to him, a receiver will not be appointed to sell stock owned by the parties jointly, though in proportions dependent on the state of the partnership accounts, before it is judicially determined how much

of the stock belongs to each party, where no insolvency is alleged and the defendant denies the entire equity of the complaint, and offers and consents that one-half of the stock may be transferred to the plaintiff, and to give security to indemnify him for any balance he may establish in his favor. *Buchanan v. Comstock*, 57 Barb. 568.

Where, in an action of settlement, the trouble and expense of collecting accounts would render them less productive than their immediate sale, or, being desperate or of little value, the delay of collection will prevent a final partition within a reasonable period, such reasons will justify their sale; but as a general rule they should not be sold except for cause shown. *Pratt v. McHatton*, 11 La. Ann. 260.

The fact that one of several partners who has in his possession all the assets of a firm paid two of the partners their capital invested under the belief that, on a sale of the goods, there would be no loss, does not bind him to anticipate the sale of the goods in settling with the other partners when called upon by them for an account. *Derby v. Gage*, 38 Ill. 27.

No right of redemption need be reserved when property of an insolvent partnership is ordered to be sold for payment of partnership debts. *Rhodes v. Williams*, 12 Nev. 20.

Upon the petition of one of the parties a receiver was appointed to take charge of the partnership as-

---

(g) See *Wild v. Milne*, 26 Beav. 504.

unless some other course can be followed consistently with the agreement between the partners. And even where the partners have provided that their shares shall be ascertained in some other way, still, if owing to any circumstance their agreement in this respect cannot be carried out, or if their agreement does not extend to the event which has in fact arisen, realization of the property by a sale is the only alternative which a court can adopt. (*h*)<sup>1</sup>

**Agreement for equal division.**—Thus, in *Cook v. Collingridge*, (*i*) where the partners had agreed that on the expiration of the partnership the stock in trade should be divided between the partners, it was held that as this could not be literally carried into effect there must be a sale and a division of the proceeds.<sup>2</sup>

sets of the firm of L. & Co., and he reported to the court an offer of purchase of the partnership assets. Certain creditors united in a request that the offer should be accepted, and, in consideration of its acceptance and of their *pro rata* share of the dividends thereunder, they agreed and covenanted, under seal, to release the firm from all indebtedness. The offer was accepted; and, in pursuance of an order of notice by the court, B. & C., who did not sign the agreement to release, filed their claim and received a dividend thereon.

*Held*, 1. That the fund thus derived from the sale of the partnership property being in a court of equity for distribution, all the creditors of L. & Co. had the right to claim their proportion thereof; and it was not in the power, either of the assenting creditors or the partners themselves, or of the court, or all combined, to require creditors to execute releases as a condition upon which they should be per-

mitted to participate in the distribution.

2. That a condition annexed by one of the partners to his assent to the sale, that the creditors should release the firm from all indebtedness, was one that he had no right to dictate.

3. That the doctrine of equitable estoppel would prevent the non-releasing creditors, after filing their claim and receiving a dividend thereon, from denying validity of the sale made by the receiver; but they were not bound by conditions to which other creditors assented, and which they had no right to impose, except upon themselves. *Loney v. Bayly*, 45 Md. 447.

(*h*) But see *Syers v. Syers*, 1 App. Ca. 174, *infra*, p. 556.

<sup>1</sup> See *Quinlivan v. English*, 42 Mo. 362.

(*i*) Jac. 607. And see *Rigden v. Pierce*, 6 Madd. 353.

<sup>2</sup> Where the firm debts have been paid, the surviving partner and representatives of the deceased

**Agreement to take at valuation.**— So if on the death of a partner an option is given to a third party, *e. g.*, his son or executor, to take his share at a valuation, and this is not done, a sale will be ordered. (*k*) Again, in a case where the articles had provided that on a dissolution by [\*556] \*the death of a partner his share should be taken by the survivors at a valuation,<sup>1</sup> and they had after-

partner may properly make a specific division of remaining assets between them if they see fit to settle the business in that way. *Kimball v. Lincoln*, 99 Ill. 578; *S. C.* 5 Bradw. 316; 7 Bradw. 470.

Partition is not an incident to a suit for partnership accounting in which the partners usually have the right to have the assets disposed of. If land belonging to the firm is not disposed of it must be left as a distinct tenancy in common, so that the tenants may have it partitioned in a separate suit. *Godfrey v. White*, 43 Mich. 171. See, also, *Berry v. Folkes*, 60 Miss. 576; *Way v. Stebbins*, 47 Mich. 296.

Where, in a partnership for the purchase and sale of lands, plaintiff's services are put against the use of defendant's money, with the understanding that, upon the sale of the lands, defendant should be reimbursed his money with interest, and that the profits should be divided, and lands are purchased accordingly in defendant's name, held that the plaintiff was entitled to no part of the lands or profits until final settlement, and that an action for partition of the lands was properly dismissed. *Pennybacker v. Leary*, 65 Ia. 220.

Where the articles provide that, in case of a sale of partnership property before the expiration of

the partnership, the proceeds should be divided equally between the partners, one partner cannot be deprived of his right to such a distribution without his consent. *Moore v. Knott*, 12 Oreg. 260.

(*k*) See *Downs v. Collins*, 6 Ha. 418; *Kershaw v. Matthews*, 2 Russ. 62; and *Madgwick v. Wimple*, 6 Beav. 495.

<sup>1</sup> See *Quinlivan v. English*, 42 Mo. 362.

Upon a dissolution the court cannot compel the continuing partners to take an unexpired lease and good-will of the business at a valuation. If not disposed of by consent they must be sold like other partnership effects. *Dougherty v. Van Nostrand*, 1 Hoffm. 68.

Plaintiff and defendants having been partners in business, and having by mutual agreement dissolved, the defendants, by a written stipulation, agreed to pay the plaintiff for his interest in the good-will of the business such sum as it should be decided to be reasonably worth, by arbitrators to be appointed by the parties. Under this agreement arbitrators were appointed, who were unable to come to any decision on the question submitted to them. *Held*, that plaintiff could not maintain an action to have the value of his interest determined and paid to him, and that, in the absence of



wards agreed that in the event of a dissolution by bankruptcy the same course should be followed as in the event of a dissolution by death, it was held that this last agreement, not being under the circumstances binding on the assignees, the partnership property and effects ought to be sold. (*l*)

On the other hand, if the articles of partnership can be carried out in their spirit, and if a sale is inconsistent with them, then the rule in question will not apply, as, for example, in those cases already noticed, (*m*) in which it has been agreed that a deceased partner's share shall be ascertained by valuation, or from the last signed account. Moreover, in *Syers v. Syers*, (*n*) it was held by the house of lords that in the case then before it the court could, in its discretion, either order the sale of the undertaking as a going concern or approve of the purchase by one partner of the share of his copartner. (*n*)

**No sale where there is an agreement to the contrary which can be acted on — Sale not decreed although one partner was lunatic.**—The rule as to selling partnership property is merely adopted in order that justice may be done to all parties, when no other course has been or can be agreed upon. It is not an arbitrary rule, inflexibly applied in all cases whether it is necessary or not; and although, if one partner or his representatives insist on a sale, the court may not be able to refuse to enforce that right, (*o*) still the court is always inclined to accede to any other mode of settlement which may be fair and just be-

bad faith on the part of defendants, the rendering of an award by the arbitrators was a condition precedent to the plaintiff's right of action. *Altman v. Altman*, 5 Daly, 436.

(*l*) *Wilson v. Greenwood*, 1 Swanst. 471.

(*m*) See *ante*, p. 429 *et seq.*

(*n*) 1 App. Ca. 174. The agreement between the partners was

probably not intended to create a partnership, but a loan (see *ante*, book i, ch. 1, § 2); and *qu.* whether the discretion alluded to exists in all cases? But why should it not? Its exercise would often be most beneficial.

(*o*) *Wild v. Milne*, 26 Beav. 504, and *Rowlands v. Evans*, 30 Beav. 302.

tween the partners. In a case where one partner had become lunatic, and a decree for a dissolution had been obtained on that ground, and an offer was made by the other partners to pay a sum of money as the lunatic's share, the court referred it to the master to inquire whether it would be for the benefit of the lunatic that such offer should be accepted; and on the master reporting in the [\*557] affirmative the court ordered that the offer \*should be accepted, thereby dispensing with a sale and winding up in the ordinary way. (*p*) So, if one partner is an infant, and it appears that it will be for his benefit that the whole property shall be sold to one or more of the partners who are desirous of buying it, and the other partners consent, the court will sanction a sale accordingly. (*q*) But although it may be for the benefit of an infant or lunatic partner that his share should be sold, yet if the other partners insist on the sale of the whole property they are entitled to such a sale. (*r*)

**Mining partnership.**—Co-owners of land, whether mineral or not, are entitled to a partition and not a sale, except in the cases specified in the Partition Acts, 1868 and 1876; and even although they may be partners in the profits arising from the land, still, if the land itself is not partnership property, one co-owner is not entitled to have it sold against the wishes of the others, except under those statutes. (*s*) But if land or a mine is partnership property the right of each partner is to have it sold; and a partition can only be decreed by consent. (*t*)<sup>1</sup>

(*p*) *Leaf v. Coles*, 1 De G. M. & G. 171. See, too, *Prentice v. Prentice*, 10 Ha. App. 22.

(*q*) *Crawshay v. Maule*, 1 Swanst. 530.

(*r*) *Rowlands v. Evans*, and *Williams v. Rowlands*, 30 Beav. 302.

(*s*) See *ante*, p. 56.

(*t*) *Wild v. Milne*, 26 Beav. 504. And see *Burdon v. Barkus*, 4 De G. F. & J. 42, and *Rowlands v. Evans*,

30 Beav. 302. As to mines not salable without the consent of the landlord, see *Lees v. Jones*, 3 Jur. N. S. 954; and as to unsalable but valuable assets, *infra*, note (*d*).

<sup>1</sup> Real estate of a partnership, after its dissolution, is to be converted into personalty by a court of equity only when such conversion is required for the payment of claims against the partnership which are

**Mode of selling.**—The sale to which each partner has a right is a sale to the highest bidder. (*u*) But with a view to do as little injustice as possible, when the court orders a sale it will, if necessary, direct an inquiry as to the proper mode of selling, (*x*) and whether it will be for the benefit

in the nature of debt. *Shearer v. Shearer*, 98 Mass. 107.

Although, as a general rule, so far as the partners and their creditors are concerned, real estate of the firm is regarded in equity as personal property, and, in case of dissolution, is often decreed to be sold as a proper method of ascertaining its value and making an equal distribution of the partnership effects, yet where partners have taken title to real estate as tenants in common, and all the debts due to third persons and between themselves have been discharged, and an equal distribution of the assets can be made without a sale of the real estate, such a sale need not be ordered on a dissolution, unless it appears that such an order would be most beneficial to the partners. *Pierce v. Covert*, 39 Wis. 252.

In this case, which was an action for the dissolution of a partnership, it appeared that the assets in money, notes and accounts were much more than sufficient to pay all debts, and that title to real estate of the firm had been taken by the partners in their individual names as tenants in common; that one of the partners was dead, and his personal representatives, heirs and widow were made parties to the action; and that another of the partners had conveyed his undivided third of the real property to one G., not a member of the

firm, who was made defendant. The complaint alleged that the real estate could not be divided without great prejudice to the owners, but there was no pretense that the sale was necessary for an equal distribution of the assets. *Held*, that the court erred in ordering G. to convey his undivided one-third of the real property to the receiver appointed in the action. *Pierce v. Covert*, *supra*.

A partnership, however, for buying and selling lands is governed by the same principles as ordinary partnerships; and, after the expiration of such partnership, a court of equity will decree a sale of the land purchased, and a proper division of profit or loss, according to the terms of the partnership. *Olcott v. Wing*, 4 McLean, 15.

One partner cannot maintain a bill for a partition of partnership land, after a suit for an account of the partnership is barred by the statute of limitations, without offering to account with his copartner. *Baird v. Baird*, 1 Dev. & B. Eq. 524.

(*u*) No partner has a right to buy or to compel his copartners to buy at a valuation unless there is some agreement to that effect. *Burdon v. Barkus*, 4 De G. F. & J. 42, and other cases cited *ante*, p. 555, note (*f*).

(*x*) As in *Wilson v. Greenwood*, 1 Swanst. 484; *Cook v. Collingridge*, Jac. 624. See, also, *Syers v. Syers*,

of all parties that there should be an immediate sale, or that the concern should be carried on for the purpose only of winding up its affairs; and if the latter is the [\*558] case the court will give any of the parties \*liberty to propose himself as manager until a sale. (*y*) In *Rowlands v. Evans*, (*z*) partnership property was ordered to be sold, as a going concern, by a disinterested person, with liberty to all parties to bid; and an interim receiver and manager was appointed.

**Conduct of sale and leave to bid.**—The court is extremely reluctant to give parties who have the conduct of a sale liberty to bid at it;<sup>1</sup> and the conduct of a sale in an action usually belongs to the plaintiff; if, therefore, he desires to bid, some arrangement has generally to be made respecting the conduct of the sale. Other parties interested have seldom any difficulty in obtaining liberty to bid. (*a*) Where the court has given the conduct of the sale to any person the court will not allow him to be interfered with. (*b*)

**Sale of good-will.**—In selling the good-will of a going concern the book debts and business ought to be sold in one lot, and the purchaser ought to be informed, if the facts be so, that the sellers are entitled to carry on business in competition with him. (*c*)

**Unsalable but valuable assets.**—If one of the partners hold an appointment which is not salable, but the profits of which are by agreement to be accounted for by him to the partnership, the partner holding the appointment will

1 App. Ca. 174, where an inquiry was directed as to the value of the plaintiff's interest.

(*y*) *Crawshay v. Maule*, 1 Swanst. 529; *Waters v. Taylor*, 2 V. & B. 306. See, too, *Wild v. Milne*, 26 Beav. 504.

(*z*) *Rowlands v. Evans*, and *Williams v. Rowlands*, 30 Beav. 302. So in *Pawsey v. Armstrong*, 18 Ch. D. 698.

<sup>1</sup> Where partnership property is

sold under a decree of court for the payment of the joint debts, and one of the partners becomes purchaser, the record should show payment before confirmation. *Renfrow v. Pearce*, 68 Ill. 125.

(*a*) See, on this subject, *Seton on Decrees*, 1396 (4th ed.).

(*b*) *Dean v. Wilson*, 10 Ch. D. 136.

(*c*) See *Johnson v. Helleley*, 34 Beav. 63, and 2 De G. J. & Sm.

be debited with its value; for that is the only mode in which, upon a dissolution, such a source of gain can be dealt with. (d) The same principle applies to other unsalable but valuable assets, to which one partner has no exclusive right. (e)

**Pending contracts.**— But if the object of the partnership is to carry out a certain contract which is unfinished when the partnership is dissolved the court will not necessarily order the benefit of it to be sold; nor order the share of a partner in it at the time of dissolution to be ascertained by valuation; but will leave the partners \*to [\*559] complete the contract, and will postpone the ultimate account until its completion. (f)

**Sale before trial.**— Although it is not usual for the court to direct a sale before the trial of the action, still, if circumstances require it, an order for a sale will be made on motion, even although the partnership has not been previously dissolved. (g)

## SECTION VII.—OTHER MISCELLANEOUS ACTIONS.

### 1. *Between persons who have agreed to become partners.*

**Action on agreements for partnerships.**— If a person agrees to become a partner and he breaks his agreement an action for damages will lie against him,<sup>1</sup> and any pre-

(d) See *Smith v. Mules*, 9 Ha. 572; *Ambler v. Bolton*, 14 Eq. 427.

(e) *Ibid.* See *ante*, note (t).

(f) See *McClellan v. Kennard*, 9 Ch. 336, where the surviving partners urged that this would not be fair, as they might have to find all the capital to complete the contract.

(g) *Bailey v. Ford*, 13 Sim. 495; *Crawshay v. Maule*, 1 Swanst. 506, 523, 524 and 529; *Wilson v. Greenwood*, 1 Swanst. 483. See, also, *Hargreaves v. Hall*, 11 Eq. 415, the order of July 22, 1869.

<sup>1</sup> Where several parties agree to enter into a partnership on a future day, but a part refuse to comply with the agreement and the partnership is never *launched*, the only remedy of the other parties is an action at law for the breach. *Goldsmith v. Sachs*, 8 Sawyer, C. Ct. 110; S. C. 17 Fed. Rep. 726.

That an action at law lies in such case, see, also, *Hill v. Palmer*, 56 Wis. 123; S. C. 43 Am. Rep. 703.

In an action for breach of contract to form and continue a partnership for a specified time, the

mium he may have agreed to pay may be recovered; (*h*) and it is no defense that the defendant has discovered that the plaintiff is a person with whom a partnership is undesirable. (*i*) So, if a member of a firm agrees to introduce a stranger, an action lies at the suit of the latter against the former for a breach of this agreement,<sup>1</sup> although it may have been made without the knowledge of the other members of the firm and they may decline to recognize it. (*j*)

[\*560]

\*2. *Actions between partners.*

The Judicature Acts and rules have materially altered the law relating to actions between partners. Formerly no action at law could be maintained by one partner against another if it in any way involved taking a partnership account; for, although the right to an account was a legal right, the old action of account, at least between partners, had long become obsolete, and courts of law had no machinery enabling them to do justice in matters of account. (*k*) Hence it became settled that actions involving accounts be-

opinions of witnesses as to the value of the contract to the plaintiff, or as to what would have been his share of the profits had the contract been carried out, is incompetent, and its reception error. *Reed v. McConnell*, 101 N. Y. 270. See, however, *Waco Water Co. v. Sanford*, 1 Tex. App. (Civ.) 77.

(*h*) *Walker v. Harris*, 1 Anst. 245; *Gale v. Leckie*, 2 Stark. 107. In *Figes v. Cutler*, 3 Stark. N. P. C. 139, it was held that an action for breach of an agreement to become a partner could not be supported without proof of the terms of the intended partnership. See, also, *Morrow v. Saunders*, 1 Brod. & Bing. 318. But see *McNeill v. Reid*, 9 Bing. 68.

(*i*) *Andrewes v. Garstin*, 10 C. B. N. S. 444, where the defendant

pleaded that since the agreement was entered into he had discovered that the plaintiff had been guilty of fraud and dishonesty towards a former partner.

<sup>1</sup> See *Byrd v. Fox*, 8 Mo. 574.

(*j*) *McNeill v. Reid*, 9 Bing. 68.

(*k*) No instance of an old common-law action of account brought by one partner against another is known to the writer. The old action of account is obsolete, although there have been a few instances of it in modern times between tenants in common of real property. See *Baxter v. Hozier*, 5 Bing. N. C. 288; *Sturton v. Richardson*, 13 M. & W. 17; *Beer v. Beer*, 12 C. B. 60; *Henderson v. Eason*, 17 Q. B. 701; reversing *Eason v. Henderson*, 12 id. 986.

tween partners could not be sustained. The Judicature Acts and rules have, however, abolished this rule; and the present state of the law on this subject appears to be as follows:

**First as regards real property.**—The equitable as well as the legal ownership must be regarded; and no partner can eject or expel his copartners from land in which he may have the legal estate, but of which he is a trustee for the firm, nor can he maintain an action against his copartners for coming on such land. On the other hand, they can restrain him from excluding them therefrom. (*l*) Whether the relation of trustee and *cestuis que trustent* exists depends upon whether the property is partnership property or not, upon whether the partnership is dissolved or not, and upon whether, if dissolved, the property is a partnership asset in which all the partners are still interested.

**Secondly as regards personal property.**—Partners are tenants in common or joint tenants of the goods and chattels belonging to the firm; but one partner has no right to take possession of \*them and to exclude his [\*561] copartners from them; and he can, it is apprehended, be restrained from doing so. (*m*)

**Thirdly, as regards actions for money demands or damages.**—The three following rules may be taken as guides:

1. An action for damages may be maintained by one partner against another in all those cases in which such an action might have been maintained before the Judicature Acts; provided the action would not have been restrained by a court of equity.

2. Any action which would have been so restrained cannot be supported.

3. An action may be maintained by one partner against

(*l*) As to the old law, see *infra*,      (*m*) As to the old law, see the  
the note at the end of this section,      note at the end of this section,  
and as to injunctions in such cases,  
*ante*, p. 541.

another for any money demand which before the Judicature Acts could have been made the subject of a suit for an account. (*n*)

Practically, the important questions which will arise under the new procedure are reduced to the following:

1. When can an action be maintained between partners without taking a general account of all the partnership dealings and transactions?

2. When will such an account be ordered without a dissolution of the firm?

The second of these questions has been already considered. (*o*) The first, which has also been alluded to, (*p*) can only be answered generally by saying that each case must depend upon its own circumstances and upon whether justice can really be done without taking such an account. (*q*) But there appears to be no reason why an action should not be brought to have some disputed item in an account settled, and why a declaratory judgment should not be pronounced settling that dispute without going further, unless it should become necessary to do so.

[\*562] \*NOTE ON THE LAW AS IT STOOD BEFORE THE JUDICATURE ACTS.

Although the law relating to actions at law between partners has been completely altered, a summary of it may still be useful for reference, and is accordingly here appended.

*When an action would lie.*

**1. Ejectment and trespass by one partner against another.**—As regards real property. In an action of ejectment a plea on equitable grounds was not allowed. (*r*)<sup>1</sup> Hence, if a firm was in the occupation of

(*n*) A transfer to the chancery division may become necessary in some of these cases. See *ante*, p. 458.

(*o*) *Ante*, p. 494 *et seq.*

(*p*) *Ibid.*

(*q*) On this head the old cases referred to *infra*, p. 564, as illustrating the sixth rule, will still be useful. See, also, *ante*, p. 494.

(*r*) *Neave v. Avery*, 16 C. B. 328.

<sup>1</sup> A. and B. owned real estate as partnership property, the title standing in B.'s name; upon dissolution B. sold to A., who agreed to pay the debts; afterwards this sale and agreement was canceled, and A. reconveyed one-half to B., retaining the other half; afterwards B. sold the whole to M.,



land, the legal estate in which was in one of the partners only, he could at law eject his copartners; (s) and if the firm had been dissolved no notice to quit was necessary before ejectment, (t) or trespass, (u) was brought against them. The equitable doctrine that a partnership, although dissolved, subsists for the purpose of winding up its affairs, afforded no defense at law to such an action. (x) If the legal estate was in all the partners and one partner actually excluded the others from the land legally belonging to all, ejectment would lie; (y) and if one utterly destroyed the common property, an action for damages might be sustained; (z) but for injuries not amounting to the utter exclusion by one partner of the others an action, it seems, did not lie. (a)

**2. Trover by one partner against another.**—As regards personal property. If one of several joint tenants, or tenants in common, was in exclusive possession of the common property, he had a right so to continue if he could, and no action against him would lie at the suit of his co-tenant. (b)<sup>1</sup> But if one tenant in common or joint tenant destroyed, (c) or, as it seems, sold, (d) the common property, he might be

with notice of A.'s rights. *Held*, that A. could enforce his title to the half against M. at law; that the agreements between A. and B. divested it of its character as partnership property, and therefore that A. need not proceed in equity to have the firm affairs settled before asserting his title to his half of the land. *Brush v. Maudwell*, 14 Cal. 208.

(s) *Francis v. Doe*, 4 M. & W. 331; *Smith v. Howth*, 10 Ir. Com. Law Rep. 125.

(t) *Doe v. Bluck*, 8 C. & P. 464.

(u) *Benham v. Gray*, 5 C. B. 138.

(x) See the last case.

(y) See *Peaceable v. Read*, 1 East, 568; *Doe v. Horn*, 3 M. & W. 333, and 5 id. 564.

(z) See *Cubitt v. Porter*, 8 B. & C. 257; *Stedman v. Smith*, 8 E. & B. 1.

(a) But see *Martyn v. Knowllys*, 8 T. R. 146; *Stedman v. Smith*, 8 E. & B. 1.

(b) See 2 Wms. Saund. 47, o; *Foster v. Crabb*, 12 C. B. 136; *Holliday v. Camsell*, 1 Tr. 658; *Fennings v. Grenville*, 1 Taunt. 241.

<sup>1</sup> A partner may maintain an action against his copartner for an injury to his individual property used in the copartnership business. *Newby v. Harrell*, 5 S. E. Rep. (N. C.) 284.

Where by the terms of the partnership one partner is entitled to the exclusive possession of certain personalty in order to carry out the objects of the firm, the other cannot lawfully interfere with such possession; and for a violent or fraudulent taking of such property possessory warrant will lie. *Ivey v. Hammock*, 68 Ga. 428.

A partner in a chattel, who has the exclusive right to control and sell it, may maintain replevin for it against the vendee of his copartner, who has notice of his right. *Harkey v. Tillman*, 40 Ark. 551.

(c) *Barnardiston v. Chapman*, cited in 4 East, 121, and Bull. N. P. 34-5; 2 Wms. Saund. 47, o.

(d) *Mayhew v. Herrick*, 7 C. B. 247; *Barton v. Williams*, 5 B. & A. 395; *Williams v. Barton*, 3 Bing. 139.

sued at law by his co-tenant. In the case of a sale, however, the purchaser could not be made to restore the property, for he at all events acquired the interest of the vendor, and became therefore tenant in common with the other owners, and could not be sued by them at law. (e)

[\*563] **\*Trover after division of property.**— If, on a dissolution of partnership, the partnership property had been divided in specie amongst the partners, each might recover what had been allotted to him, for as to that he had become sole owner; (f)<sup>1</sup> and if the dissolution

(e) *Fox v. Hanbury*, Cowp. 445, and other cases of that class.

(f) See *Jackson v. Stopherd*, 2 Cr. & M. 361; and *Wiles v. Woodward*, 5 Ex. 557.

<sup>1</sup> When on the winding up of a partnership business the partnership effects are divided between the several partners by an actual separation thereof, so that certain specific articles are assigned to each as his individual share, either partner may maintain an action at law against the other in respect to such articles. But a mere agreement to divide affords no foundation for such an action. Until the effects are actually separated they remain joint assets, and, as neither partner has in such a case a remedy at law to specifically enforce the agreement, equity has jurisdiction to grant relief. *Hunt v. Morris*, 44 Miss. 314. See, also, *Jenkins v. Howard*, 21 La. Ann. 597.

Plaintiff and defendant, being partners in business, agreed that the plaintiff should assign to the defendant an undivided third of a patent, of which he and a third partner of them both were owners, and that the defendant should pay to the plaintiff a sum of money, furnish the means necessary to develop the invention, and carry on the business thereunder as long as they should agree, the defendant

to have one-third of the profits. At the beginning of the partnership plaintiff brought to the shop of the firm machinery and materials which before belonged to him, and were needed and used for the development of the invention. After some months the defendant put an end to the business and took possession of all the property on hand, including what remained of the said machinery and materials. It was admitted that this property belonged to the partners in equal shares. *Held*, that the plaintiff could not maintain an action against the defendant for its value. *Remington v. Allen*, 109 Mass. 47.

Partners agreed, under seal, to dissolve, and that one should take all the assets, pay the debts and divide the surplus, each agreeing with the other to make up any deficiency. *Held*, that trover would lie by the liquidating partner against the other for refusal to deliver the goods. *Bartley v. Williams*, 66 Pa. St. 329.

That one partner fraudulently converts to his own use property supplied by another for the partnership use dissolves the partnership, or at least gives the injured party a legal right of action. *Crosby v. McDermitt*, 7 Cal. 146.

Where A., one partner of a firm,

and the division of the property was made by deed, each partner was precluded from denying that any division had in fact been made, or that the previously existing tenancy in common had not been determined, and each, therefore, was entitled to recover what the deed declared to be his. (*g*)

**3. Action for breach of express contract by one partner against another.**—An action for damages for the breach of an express agreement entered into by one partner with another would lie if the damages when recovered would have belonged to the plaintiff alone.<sup>1</sup> Thus

sold all the goods in the store, against the will of his copartner, B., and A. and the purchaser broke open the store, and the goods were delivered to the purchaser, *held*, that B. could not maintain trespass against A. and the purchaser jointly, nor against A. except for the goods actually destroyed. *Montjoys v. Holden*, Litt. Sel. Cas. 447. See, also, *Mason v. Tipton*, 4 Cal. 276.

A partner cannot maintain replevin against his copartner for any of the partnership property. *Whitesides v. Collier*, 7 Dana, 283; *Azel v. Betz*, 2 E. D. Smith, 188. See, also, *Buckley v. Carlisle*, 2 Cal. 420.

A partner cannot arrest his copartner upon affidavit of fraudulent removal of the partnership property. *Cary v. Williams*, 1 Duer, 667.

Where one partner holds possession of the partnership property, and refuses to let his copartner into possession, he will, in equity, be *held* to pay to such copartner or his vendee the value of the use of the property so withheld. *Adams v. Kable*, 6 B. Mon. 384.

(*g*) *Ibid*.

<sup>1</sup> See *Glover v. Tuck*, 24 Wend. 153; *Terry v. Carter*, 25 Miss. 168; *Kinlock v. Hamlin*, 2 Hill (S. C.), Ch. 19; *Fowlber v. Rhodes*, 12 Mo.

225; *Robinson v. Bullock*, 58 Ala. 618; *Whitehall v. Shickle*, 43 Mo. 538; *Wills v. Simmons*, 15 N. Y. Supreme Ct. 189; *Morgan v. Nunns*, 54 Miss. 308; *Moritz v. Phelps*, 4 E. D. Smith, 135; *Hunt v. Reilly*, 50 Tex. 99.

An express agreement by one tenant in common or partner to pay his co-tenants or copartners for the use of the joint property for his own individual benefit is valid and may be enforced in an action at law. *Davies v. Skinner*, 58 Wis. 638.

An action will lie upon a promissory note executed by one partner to another in consideration of a sale of his interest in partnership property. *Clark v. Fowler*, 57 Cal. 142.

A defense in an action at law by the payee of a promissory note or his representatives, that there was a failure of consideration in that the note was based upon a certain partnership transaction between the parties which was still unsettled, and the amount due from one to the other therefore unknown, is an equitable defense which cannot be set up in that action. *Burns v. Scott*, 117 U. S. 532.

A suit at law may always be maintained for a breach of partnership articles, where the business of the partnership has not been com-

where a partner retired and he covenanted with his copartners not to carry on business within certain limits, or they covenanted to indemnify him against the debts of the firm, actions for damages occasioned by

menced, and there are no accounts in dispute between the partners. And where some of the parties have sold out their interest before the matter in controversy arose, they need not be made parties. *Vance v. Blair*, 18 Ohio, 532.

A stranger to the articles of copartnership cannot maintain an action to enforce any of the stipulations between the partners other than one directly for his benefit. *Greenwood v. Sheldon*, 31 Minn. 254.

If a contract, though made concerning the partnership affairs and in furtherance of the joint undertaking, is the individual contract of the partners who are parties to it, and if it is made by them in their own names and not in the name of the firm, an action may be maintained thereon by one against the others during the continuance of the partnership. *Wright v. Michie*, 6 Gratt. 354.

An action will lie for a breach of a covenant to continue a partnership for a fixed period unless sooner dissolved in accordance with the terms of the articles of such partnership. *Bagley v. Smith*, 10 N. Y. 489; *Addams v. Tutton*, 39 Pa. St. 447.

In a suit by one member of a partnership against another for a breach of a covenant to continue a partnership for a fixed term, the loss of prospective profits from the performance of the contract is the true measure of damages, and in such case the plaintiff's claim for profits should not be limited to

the interval between the dissolution of the partnership by the act of the defendant and his subsequent entry into business. *Bagley v. Smith*, 10 N. Y. 489.

The measure of damages in an action for a breach of a partnership agreement is the value of the contract broken according to its value separate and independent of any former contract. *Addams v. Tutton*, 39 Pa. St. 447.

Where one partner agrees with his copartner, who has just acquired an interest in the property used by them as a distillery, to pay a certain tax due the United States, so as to save the property from seizure and sale, and gives personal security for such payment, and afterwards pays such tax out of the partnership funds, charging himself with the amount, the other cannot, in an action at law, recover more than nominal damages until the partnership accounts are settled. *Smith v. Reddell*, 87 Ill. 165.

An express promise by one partner, out of his share of the income, to pay another partner for his personal attention to the business of the concern, may be enforced in *assumpsit*, although the articles of copartnership are under seal and provide for such payment. *Paine v. Thatcher*, 25 Wend. 450.

A stipulated compensation may be recovered at law though payable out of profits. *Robinson v. Green*, 5 Harr. 115.

Where a partnership covenant recites that A. and B. had entered

breaches of these covenants would clearly lie. (*h*) So, if a partnership was entered into for a definite time, and one partner was turned out by his copartners before that time had expired, he could sue them for this

into partnership; that A. had purchased and put into the firm goods to the amount of \$2,696.26; that he had received of B. a negro, at \$600, in part payment of the goods; that they were to be at equal expense and profits in the goods: and that B. was to account to A. for one-half of said goods, except the said negro at \$600,—the agreement to account will be held to have arisen prior to the partnership transactions and A. may maintain an action of covenant against B. for failing to account for the balance of one-half of the price of the goods. *Bailey v. Starke*, 6 Ark. 191.

Even where a party to a contract was held to be a partner by the terms of the contract, yet, if it contained an express covenant to pay him his losses, or the amount of his advances less his receipts, at the end of a specified time, an action at law upon the covenant may be resorted to, and a bill in equity calling for a settlement of the partnership accounts is unnecessary. *Whitehill v. Shickle*, 43 Mo. 538.

If three or more copartners enter into mutual covenants, where they contribute severally and in different proportions to the joint stock, their covenants are several, and each partner has his several remedy for a breach. *Dunham v. Gillis*, 8 Mass. 462.

Where, by articles of association,

each of the associates severally bound himself to pay a ratable proportion of all expenditures for improvements made or to be made, *held*, that the undertaking was mutual, the covenants of the associates being made with each other, and that the liability arose on the promise by each party to the other, which could only be enforced by an action among themselves. *Troy, etc. Factory v. Corning*, 45 Barb. 231.

A promise by a continuing partner to reimburse a retiring partner for taking up, by his individual note, a partnership note on which the latter is still liable, but which the former has at the dissolution promised to pay, will sustain an action, a demand, whether necessary or not, having been first made. *Warbritton v. Cameron*, 10 Ind. 302.

Two partners, A. and B., on dissolution of the partnership, entered into an agreement, the performance of which was secured by a penalty, by which A. conveyed and assigned to B. all the business, effects and debts of the firm, and B. agreed to pay all the debts due by the firm. On a bill filed by B. against A., alleging that A. had failed to deliver to him all the notes, bonds and effects of the concern, according to the agreement, and praying that A. might be decreed to perform his

(*h*) *Leighton v. Wales*, 3 M. & W. 545; *White v. Ansdell*, Tyr. & Gr. 785. *Barker v. Allan*, 5 H. & N. 61, is an instance of a successful

action by a shareholder against directors who had agreed to indemnify him against calls. See, too, *Haddon v. Ayers*, 1 E. & E. 118.

breach by them of their agreement and recover damages for the injury he had sustained; (i) so an action might be maintained for not rendering accounts and dividing profits; (k) for a penalty stipulated to be paid in

part of the agreement, but not alleging fraud nor asking a rescission of the agreement, *held*, that the remedy of B. was at law, and that chancery had no jurisdiction. *Clark v. Clark*, 4 Port. 9.

Where one partner has made profits, by engaging in any other business in violation of his contract, his copartner has his option to sue for damages for the breach of the contract, or to bring a bill in equity to compel an accounting. *Moritz v. Perbles*, 4 E. D. Smith, 135.

An action may be maintained for the breach of promise to admit the plaintiff as a partner in an undertaking in which the plaintiff and defendant mutually agreed to become partners and share the profits and losses. *Byrd v. Fox*, 8 Mo. 574. See, also, *Lane v. Roche*, *Riley*, Ch. 215.

When a firm has been dissolved, and one partner has assumed the entire control of the goods, an action may be brought by such a partner against another partner to whom he has sold a portion of the goods at the other's request, and on a promise to pay him, and not the firm. *Caswell v. Cooper*, 18 Ill. 532.

Upon a sale by one partner of his interest to the other, who agrees to pay him therefor the capital which the former had put into the original business "as soon as he can

do so without inconvenience," an action at law, and not a bill in equity, is the proper remedy to recover the price; such capital stock being ascertainable without any adjustment of the losses and profits. *Wells v. Carpenter*, 65 Ill. 447.

Where one of two partners, by agreement between them, take certain specific articles of partnership property, and agrees to pay his co-partner, for his share thereof, a definite sum at a specified time, the copartner may, if he chooses so to do, maintain an action to recover the amount so agreed to be paid, independent of the settlement of the partnership accounts. But this right of separate action may be waived by consenting to a full account of the partnership matters, including the price so agreed to be paid for the goods. *Neil v. Greenleaf*, 26 Ohio St. 567.

In an action on a note given by an outgoing partner for assets he may set up in defense an understanding that for any notes and accounts which should prove worthless there should be a rebate from the amount *pro tanto*. In such case no resort to equity is necessary in the first instance. *Bethel v. Franklin*, 57 Mo. 466.

Where one partner, not well acquainted with the affairs of the firm, purchased a portion of the partnership interest of the other partner, and gave his note there-

(i) See *Greenham v. Gray*, 4 Ir. Com. Law Rep. 501.

(k) *Owston v. Ogle*, 13 East, 538. And see *Stavers v. Curling*, 3 Bing. N. C. 355.

case of a breach of agreement; (*l*) for rent covenanted to be paid; (*m*) for not indemnifying the plaintiff against a debt; (*n*) for not putting the plaintiff in funds to enable him to defray expenses as agreed. (*o*)

for, relying on the representations of the latter as to its value, which he subsequently ascertained to be fraudulent, and the interest so purchased was in reality worth nothing at all, the firm being in fact insolvent at the time, *held*, that these facts constituted a good defense to an action against the purchaser upon the note in favor of the vendor or his administrator, though the purchaser may have made no offer to rescind the contract. *Smith v. Smith*, 30 Vt. 139.

On the dissolution of a partnership one partner assigned to his copartners all his interest in all the firm assets, and further covenanted not to interfere with the collection of debts owing the firm. Afterwards he receipted for one of the debts so assigned, receiving a valuable consideration. *Held*, that his copartners might maintain a suit against him for the amount of the debt. *Ross v. Vest*, 2 Bosw. 360.

Where a deceased partner covenanted for a consideration to pay the debts of the firm without unnecessary delay, and without recourse on his copartner, a failure on his part to perform the act which he had covenanted to do gives a right of action to his copartner, and the latter may in such case file his claim against the estate of the deceased partner before

he has paid any part of the partnership debts. *Hogan v. Calvert*, 21 Ala. 194.

A. and B. agreed in partnership articles that, "at the expiration of the partnership, each party shall draw from the establishment \$1,000," etc. A. brought an action of covenant on this agreement against B., assigning as a breach thereof that B. did not pay over the \$1,000. *Held*, that the declaration was insufficient. *Ridgway v. Grant*, 17 Ill. 117.

One or two partners cannot at law sue the other on his failure to perform a covenant to which they were both bound in liquidated damages by the articles of partnership; he must first apply to equity for a dissolution of the partnership. *Stone v. Fouse*, 3 Cal. 292.

One partner cannot maintain an action at law on the covenants in the articles of copartnership to recover damages of his copartner for neglect of the partnership business while there is a considerable amount due from him to his copartner, and the debts due by and to the firm, the burden of which is to be borne and the benefit enjoyed by the partners in certain proportions, are not all settled. *Capen v. Barrows*, 1 Gray, 376.

Where the owner of a hotel executes a lease thereof and thereafter enters into a contract of partner-

(*l*) *Radenhurst v. Bates*, 3 Bing. 463.

(*m*) *Bedford v. Brutton*, 1 Bing. N. C. 399.

(*n*) *Want v. Reece*, 1 Bing. 18.

(*o*) *Brown v. Tapscott*, 6 M. & W. 119.

**4. Action for not furnishing capital.**—If a person agreed to become a partner with others and to furnish a certain amount of capital, and he made default, they could sue him at law for damages, although he as well as they were to have had an interest in what he undertook to furnish. (*p*)<sup>1</sup>

ship in keeping the hotel with the lessee, with an agreement that the rent reserved shall be a charge upon the firm, if the latter contract is separate from the first it does not work a surrender of the lease, but the lessor cannot sue at law to recover the rent, but must sue in equity for a partnership accounting, as the rent must be paid out of the net profits of the partnership. *Pi Pie v. Cuzas*, 47 Cal. 174; *id.* 180.

(*p*) *Hesketh v. Blanchard*, 4 East, 144; *Venning v. Leckie*, 13 East, 7; *Gale v. Leckie*, 2 Stark. 107. *Hesketh v. Blanchard* gave rise to much controversy (see in *Stocker v. Brocklebank*, 3 Mac. & G. 265; *Rawlinson v. Clarke*, 15 M. & W. 298; *Collyer on Part.* p. 60), not indeed with reference to the question decided, but with reference to an opinion expressed by Lord Ellenborough that no partnership existed between Robertson and the plaintiff, except as regards third parties. Having regard to the decisions relating to partnerships in profits it is difficult to assent to this opinion; but the case was unimpeachable as regards the point before the court, viz., the right of the plaintiff, whether partner or not with Robertson, to recover the price of the meat for which the plaintiff had been compelled to pay.

<sup>1</sup>See *Ellison v. Chapman*, 7 Blackf. 224; *Grigsby v. Nance*, 3 Ala. 347; *Scott v. Campbell*, 30 *id.*

728; *Truitt v. Baird*, 12 Kan. 420; *Wills v. Simmonds*, 51 How. Pr. 48; *Currier v. Webster*, 45 N. H. 226.

Where one partner fails to comply with his agreement to furnish buildings and machinery for the purpose of carrying on the partnership business, the other partner may maintain an action of *assumpsit* against him for damages arising to him for such breach of contract. And, in such case, equity will not enforce a specific performance. *Wadsworth v. Manning*, 4 Md. 59.

One partner may sue another at law on a note given by the latter to the former for the payment of a part of the capital stock. *Grigsby v. Nance*; *Scott v. Campbell*, *supra*.

Where, however, a partnership is actually formed and proceeds to do business as such, such a case has been distinguished from a case where one refuses to become a partner according to his agreement; and it has been held that in the former case no action at law can be maintained by one of the partners against another for his misconduct as a member of the firm in refusing to furnish money to complete the business undertaken, as he had agreed to do in the formation of the partnership, whereby a great loss of profits was sustained. A final settlement must first be had, and this can only be enforced in equity. *Buckmaster v. Gowen*, 81 Ill. 153.



**\*Loan by one partner of sum to be brought in by the other —** [\*564]  
**Action for not contributing to expenses.**— It followed from the above that if A. and B. agreed to become partners, and each agreed to furnish a certain amount of capital, and A. lent B. the amount B. was to contribute, this loan constituted a debt for which an action by A. against B. would lie, although they may actually have become partners. (q)<sup>1</sup> And it also followed that, if partners agreed to contribute capital from time to time to meet expenses as occasion might require, and one of them was compelled to pay the whole of the expenses for which all were liable, he could sue his copartners for what they ought to have contributed according to their agreement. (r)<sup>2</sup>

**5. Action by one partner against another for matters unconnected with the partnership accounts.**— One partner might maintain an action for damages in respect of a demand which had either nothing to do with the partnership business,<sup>3</sup> or, if entangled in it, was only so en-

(q) *Elgie v. Webster*, 5 M. & W. 518; *Ex parte Notley*, 1 Mon. & Ayr. 46, and 3 D. & Ch. 367. See *Jestons & Brooke*, Comp. 793.

<sup>1</sup> A suit at law can be maintained by one partner against another for money advanced to him to launch the partnership, or to be used in the partnership business, if the claim does not necessarily connect itself with the affairs of the whole firm, and can be ascertained without a previous examination of the partnership accounts. *Currier v. Rowe*, 46 N. H. 72; *Crater v. Binniger*, 45 N. Y. 545; *Van Ness v. Forest*, 8 Cranch, 30; *Gridley v. Dole*, 4 N. Y. 486; *Aldrich v. Lewis*, 60 Miss. 229.

So an action at law will lie for labor performed under an agreement to launch a partnership. *Lawson v. Glass*, 6 Colo. 134.

A loan of money by A. to B., under an agreement that if, after further examination, A. should conclude to become a partner in the business he should have a right to do so, with a right to share profits from the day named, and that the sums loaned should in

such case be considered as capital of the firm, where there is no agreement to form a present partnership, does not constitute a partnership between the parties, and an action at law will lie upon notes given for the money so advanced. *Morrill v. Spurr*, 143 Mass. 257.

Where, under the articles, the proceeds of the enterprise constitute the primary funds for reimbursement of a partner for excess in advances, and the partnership is, by consent, terminated before they are sufficient, the partner who has advanced in excess of the amount due from them may maintain his action for the excess. *Merriwether v. Hardeman*, 51 Tex. 436.

(r) *Brown v. Tapscott*, 6 M. & W. 119. See, also, *French v. Styring*, 2 C. B. N. S. 357.

<sup>2</sup> An ascertained sum due from one partner to another by reason of failure to furnish an assistant may be recovered against such partner in an action at law. *Aldrich v. Lewis*, 60 Miss. 229.

<sup>3</sup> See *Biernan v. Biernan*, 14 Mo. 24; *Chamberlain v. Walker*, 10

tangled by reason of the wrongful conduct of the defendant.<sup>1</sup> Thus one partner who had received money to the use of another might be

Allen, 429; Haller v. Williamowicz, 23 Ark. 566; Battaille v. Battaille, 6 La. Ann. 682; Elder v. Hood, 38 Ill. 533; Paine v. Moore, 6 Ala. 129; Seaman v. Johnson, 46 Mo. 111; Crossley v. Taylor, 83 Ind. 337.

A. and B. entered into partnership, A. to furnish the land and buildings for the business, and B. certain cash capital. To enable A. to put the buildings in better repair, B. also loaned him a certain sum. The partnership business was interrupted by the death of A. *Held*, that B. was entitled to recover the amount of his loan from the estate of A. as a debt unconnected with the affairs of the partnership. *Biernan v. Braches, supra*.

Where one partner advances money for the benefit of another to relieve him from liability upon an execution issued for debts due the firm, and takes his note therefor, the contract is a private one, and may be enforced without regard to the state of the affairs of the partnership. *Chamberlain v. Walker, supra*.

If a partner's individual property used in the partnership business is damaged by the other partner, his remedy therefor is at law, not by a bill in chancery for an account of the partnership dealings. *Haller v. Williamowicz, supra*.

One who is clerk and also in partnership in a particular business with his employer may, where his duties as clerk and partner are distinct, sue for his salary due him in the former capacity without resorting to a suit for the

settlement of the partnership transactions. *Alexander v. Alexander*, 12 La. Ann. 588.

If one copartner contribute funds which it was the duty of another copartner to furnish in furtherance of a partnership enterprise, such funds thus contributed may be recovered in an action of *assumpsit* without waiting for a final adjustment of the business of the copartnership. *Wright v. Eastman*, 44 Me. 220.

A partner may sue his copartners upon an independent contract made by them as a firm with him before the partnership was formed between him and them. *Mullany v. Keenan*, 10 Iowa, 224.

Where a carpenter employed to work on a house belonging to a partnership, in which it conducts its business, buys a partner's interest when the work is nearly finished, and finishes it afterwards, he may sue the other partner for his share of the work, it not being a partnership transaction, before claiming a settlement. *Boyd v. Brown*, 2 La. Ann. 218.

<sup>1</sup>The rule that generally one partner cannot sue the other to recover money paid into the firm does not apply where one was induced by the other's fraud to sign the articles, the latter obtaining the money, not for partnership purposes, as pretended, but with intent to appropriate it to his own use. *Hale v. Wilson*, 112 Mass. 444.

The plaintiffs and the defendants purchased jointly certain real estate, which they subsequently con-

sued for it although he had paid it to the credit of the firm; for his business was to hand it over to his copartner. (s)<sup>1</sup> So a partner who, in fraud of his copartners, had given a note in the name of the firm for a private debt of his own, whereby his copartners had been compelled to pay such note, was liable to them at law for the whole of what they had been compelled to pay. (t)

**6. And for matters not involving them — Action for amount of valuation; for balance struck.**— One partner might sue another at law in respect of a matter which, though relating to the partnership business, was separate and distinct from all other matters in question between the partners, and could and ought to be determined without going into the partnership accounts. (u)<sup>2</sup> Thus where a partnership had been dissolved,

veyed to a petroleum company, receiving in part payment shares of the company's stock, which were distributed among the parties proportionately to their several interests in the land. *Held*, that there was not such a mutuality of interest between the parties as to make applicable the rule which precludes one partner from suing another, and therefore that the plaintiffs could maintain an action against the defendants to recover damages for fraud practiced on them in the purchase of the land. *Dart v. Walker*, 3 Daly, 136.

(s) *Smith v. Barrow*, 2 T. R. 476.

<sup>1</sup> A., B. and C. were partners. A., in his absence, left his private affairs in the hands of B. as his agent. On the return of A., B. gave him a writing stating receipts and expenditures as agent, and acknowledging a certain sum due to A. and "put into the partnership." *Held*, that the acceptance of such writing by A. did not make it necessary for him to resort to the partnership to recover the amount due, and that B. was liable individually. *Paine v. Moore*, 6 Ala. 129. See, also, *Seaman v. Johnson*, 46 Mo. 111.

(t) *Cross v. Cheshire*, 7 Ex. 43; *Osborne v. Harper*, 5 East, 225.

(u) The court of chancery would not restrain such actions. See *ante*, p. 543.

<sup>2</sup> *Simmons v. Murray*, 13 Daly, 477; *Edwards v. Remington*, 51 Wis. 336; S. C. 60 id. 33; *Ivy v. Walker*, 58 Miss. 253.

Where the damages resulting from a breach by one partner of a stipulation in the articles belong exclusively to the other partner, and can be assessed without taking an account, an action at law may be maintained by the injured partner for such damages. *Hill v. Palmer*, 56 Wis. 123; S. C. 43 Am. Rep. 703. Following *Sprout v. Crowley*, 30 Wis. 187.

In Texas a suit may be maintained by the personal representative of a deceased partner against another partner, without having a settlement of the partnership affairs, where the obligation sued upon shows an indebtedness by defendant independent of the state of the partnership accounts. *McKay v. Overton*, 65 Tex. 82.

Where there is but a single partnership transaction on a joint venture, which is fully closed, one partner may maintain an action at law against the other for his share of the profits of that single trans-

and it had been agreed that one partner should take all the partnership property at a valuation, and it had been valued, and he had taken it at that valuation, and the values of the shares of the other partners had been ascertained, they might separately sue him at law for the amount payable to them respectively. (v) So, if partners went through the accounts of the partnership and a final balance was struck, and the amounts of their shares were ascertained, and the person by whom those amounts were to be paid was also ascertained, an action would lie against him in respect of each share to be paid by him. (x)<sup>1</sup>

action; and in such case there is no necessity for a formal accounting. *Pettingill v. Jones*, 28 Kan. 749. See, also, *Whetstone v. Shaw*, 70 Mo. 575; *Dale v. Thomas*, 67 Ind. 570; *Feurt v. Brown*, 23 Mo. App. 332; *Fry v. Potter*, 12 R. I. 542.

(v) See *Jackson v. Stopherd*, 2 Cr. & M. 361.

(x) *Morley v. Baker*, 3 Fos. & Fin. 146; *Moravia v. Levy*, 2 T. R. 483, note; *Foster v. Allanson*, 2 T. R. 479; *Wray v. Milestone*, 5 M. & W. 21; *Brierly v. Cripps*, 7 C. & P. 709; *Preston v. Strutton*, 1 Anst. 50; *Henley v. Soper*, 8 B. & C. 16; *Rackstraw v. Imber*, Holt, 368; *Wells v. Wells*, 1 Ventr. 40.

<sup>1</sup>See *Gulick v. Gulick*, 15 N. J. Law, 578; *Clark v. Dibble*, 16 Wend. 601; *Robinson v. Williams*, 8 Metc. 454; *Ridgeway v. Grant*, 17 Ill. 117; *Pope v. Randolph*, 13 Ala. 214; *Wilby v. Phinney*, 15 Mass. 116; *Fanning v. Chadwick*, 3 Pick. 420; *McCall v. Oliver*, 1 Stew. 510; *McGehee v. Dougherty*, 10 Ala. 863; *Martin v. Solomons*, 5 Harr. 344; *Wycoff v. Purnell*, 10 Iowa, 332; *Lane v. Tyler*, 49 Me. 252; *Nims v. Bigelow*, 44 N. H. 376; *Hanks v. Baber*, 53 Ill. 292; *Bean v. Gregg*, 7 Col. 499; *Cochrane v. Allen*, 58 N. H. 250; *Personette v. Pryme*, 34 N. J. Eq. 26; *Wilson v. Fenimore*, 3 Atl. Rep.

795. See, also, *Wood v. Merrow*, 25 Vt. 340; *Warren v. Dickson*, 30 Ill. 363; *Byrd v. Fox*, 8 Mo. 574; *Killip v. Cattle*, 12 Neb. 477.

So although the plaintiff has not paid the partnership debts which he agreed to pay. *Cochrane v. Allen*, 58 N. H. 250.

A liquidating partner cannot maintain *assumpsit* against his former partner on a mere statement of account, though it has been taken and kept without objection. To give such a paper the force of an account stated there must be a specific agreement to pay. *Geyer v. Carpenter*, 39 Leg. Intel. 12; 15 Phila. 172.

In *assumpsit* against a former partner for the amount found due the plaintiff on partnership settlement, and which defendants had promised to pay him, the fact of settlement and of the joint promise to pay are for the jury. *Reynolds v. Patrick*, 52 Mich. 590.

In an action upon a contract to pay the plaintiff one-half of the defendant's interest in the net profits of a certain contract made by a firm of which he is a member, plaintiff need not allege or prove a settlement between the defendant and his copartner; it is sufficient to show the net profits in the transaction and the defendant's interest

\*The balance, however, must have been a final balance to be [\*565] paid, and not a balance to be carried over to a fresh account in

therein. *Reilly v. Reilly*, 14 Mo. App. 62.

Balances struck only preparatory to a settlement are not sufficient. Until the final settlement is had the remedy is in equity. *Burns v. Nottingham*, 60 Ill. 531. See, however, *Ivy v. Walker*, 58 Miss. 253, as to recovery of balance found due on a *partial* settlement.

No express promise to pay the balance need be alleged. *Mackey v. Auer*, 15 N. Y. Sup. Ct. 180. See, also, *Ross v. Cornell*, 45 Cal. 133; *Purvines v. Champion*, 67 Ill. 459. See, however, *Killam v. Preston*, 4 Watts & Serg. 14.

Proof of a promise to repay a certain sum in instalments, in consideration of the plaintiff's leaving the firm and removing his office within a certain time, will not support an action for a balance found due on settlement between partners. *Crawford v. Thoroughman*, 13 Mo. App. 579.

A. and B., partners in a house of entertainment, called on a person to make out an account current from the books, in the presence of the parties, and agreed verbally that they should settle by the balance found by him; and if they could not agree upon the balance found by him, then they should call in two other persons to adjust the matter, and the party against whom the balance should be found should pay it to the other. One of the parties refused to abide by the agreement, but the other proceeded, called in one person and had the account stated. Upon this account he sued the other. *Held*,

there could be no recovery, although proof was made that the account was correctly stated from the books. *Morrow v. Riley*, 15 Ala. 710.

The rule that when a balance is struck between partners, and a promise to pay is made, an action at law lies to recover the amount, applies where, on the dissolution of an incorporated association, a resolution was passed determining the share of the common fund which should be paid to each member, and the defendant (the treasurer) promised to pay such balance. *Kockler v. Brown*, 31 How. Pr. 235.

A partnership between the plaintiff and defendant having been dissolved the plaintiff agreed to pay all the debts against the company; and the defendant agreed in writing that a certain sum was the final balance of accounts between them as partners. *Held*, that the plaintiff might, before paying the outstanding partnership debts, maintain *assumpsit* against the defendant to recover the sum thus agreed to be the final balance, the defendant, if compelled to pay any such debts, having his remedy on the plaintiff's agreement. *Dickinson v. Granger*, 18 Pick. 315.

Where one partner, upon the settlement of the partnership account, promises to pay the other a certain sum, provided it shall be found that the promisor has never paid such sum to a certain third party for such other partner, upon its being ascertained that the-

continuation of that just closed. Therefore, where one partner sued another for a debt unconnected with the partnership, the defendant

money has not been paid to such third person, the promisee may recover the same from his partner in an action of *assumpsit*. *Adams v. Funk*, 53 Ill. 219.

In 1859 plaintiff and defendant's intestate each owned a bank in Wisconsin — plaintiff the C. bank, and the other the M. bank. They formed a copartnership, each contributing his bank, and together they constituted a bank known as the L. bank, and each contributed some money. The partnership thus formed continued until 1861, when it was dissolved. During the time the three banks continued to do the business as such, and had transactions with each other, as though no partnership existed between the owners. At the time of the dissolution the books of the banks showed that the M. bank was indebted to the C. bank \$1,000, and that the L. bank was indebted to it \$3,000. Upon dissolution plaintiff transferred to his partners all the interest in the M. and L. banks, and his partners transferred to him all the interest in the C. bank. The partners agreed in writing that the M. and L. banks should pay plaintiff the \$3,000 due the C. bank as soon as they conveniently could, with interest at the rate of twelve per cent.; and defendant's intestate pledged "his honor to pay the balance" as soon as it could be done without pressing the banks. In an action upon this agreement, *held*, that the indebtedness, if any, was not in favor of plaintiff against the two banks as such, but against the intestate, aris-

ing out of partnership transactions; that there was not shown to have been a final accounting between the two partners, or an express promise on the part of the intestate to pay, and that the plaintiff could not recover. The rule in New York is well settled that one partner cannot recover at law against another, except after a final accounting, balance struck and express promise to pay. *Bloss v. Chittenden*, 2 Thomp. & C. 11.

When, by common consent, all the members of a partnership charge certain of their number with the exclusive management of the business, and with the collection and disbursement of all revenues, agreeing that the managing partners shall pay over to each of the others, separately, his share of the profits when dividends accrue, each member may sue separately at law for unpaid dividends, and there is no occasion for resorting to equity; but, whether the suit for dividends is in one form or the other, it must be brought in the county where the managing partners reside, as they alone are the real debtors and the only necessary parties defendant. *Wadley v. Jones*, 55 Ga. 329.

The payment by one partner to another of a certain sum as his share is not equivalent to a settlement of the partnership account; nor is it evidence that the same sum has been ascertained as the share of each partner, so that *assumpsit* will lie by a third partner. *Beach v. Hotchkiss*, 2 Conn. 425.

After a settlement, wherein each

was not allowed to set off a balance found due to him on the partnership account, for it did not appear that the account which had been stated

partner waives his right to have all the partnership matters which may come to light after the dissolution adjusted in a single proceeding in equity, one may maintain an action at law against another to recover his proportion of money of the partnership in the latter's hands at the time of the settlement, which was not then accounted for, nor mentioned by him, nor entered on the books of the firm, no other assets of the firm having been discovered. *Dakin v. Graves*, 48 N. H. 45.

Where only a single item of account between partners remains unadjusted it can be settled by an action at law. *Buckner v. Ries*, 34 Mo. 357; *Finlay v. Stewart*, 56 Penn. St. 183; *Wheeler v. Arnold*, 30 Mich. 301; *Whetstone v. Shaw*, 70 Mo. 575; *Feurt v. Brown*, 23 Mo. App. 332; *Pettingill v. Jones*, 28 Kan. 749. See, also, *Moran v. Le Blanc*, 6 La. Ann. 113; *Dale v. Thomas*, 67 Ind. 570.

Where parties agree to engage in a single transaction for the purpose of making profits, their agreement does not amount to a partnership in such manner as to compel the partner seeking his share of the profits, or payment for work and materials furnished in excess of his proportionate share of the venture from the other partner, to resort to an action of account rendered, but he may recover in *assumpsit*. Where the partnership, if it existed, was in a single transaction, and there were no debts due by or in favor of the firm, the plaintiff, in such a case, may re-

cover, in the equitable action of *assumpsit*, that which will make him equal with his copartner. *Wright v. Cumpsty*, 41 Pa. St. 102. See, also, *Hamilton v. Hamilton*, 18 id. 20.

In an action by a partner against his copartner to recover a final balance, where there are no demands outstanding against the partnership, the plaintiff may sustain the action by showing that no part of the outstanding debts due to the partnership can be collected, and thus that the judgment to be rendered will make a final settlement between the partners, more especially if an assignment of all such outstanding debts shall have been tendered to the defendant before the action was commenced. *Williams v. Henshaw*, 11 Pick. 79. See, also, *Sikes v. Work*, 6 Gray, 433; *Williams v. Henshaw*, 12 Pick. 378.

In an action at law on negotiable promissory notes given by one partner to another for the amount of the balance ascertained upon dissolution, it is not competent for the defendant to show that there had been no final settlement of partnership accounts. *McSherry v. Brooks*, 46 Md. 103. See *Laudry v. Laudry*, 23 La. Ann. 312.

Where a copartnership was dissolved by one's selling all his interest in the goods and accounts, excepting a few which were reserved to the other two partners, and the books showed an account of the firm against such outgoing partner, which was not excepted, in a suit by the latter against the other two it was held that the amount of the

was a final account, nor that the plaintiff had ever promised to pay the balance which, on taking the account, was found due to the defendant. (y) In this last case the partnership continued after the balance sued for was struck; but, if a balance was struck and was to be paid by one partner to the other, it might probably have been sued for, notwithstanding the continuation of the partnership; for, *ex hypothesi*, it was isolated and separated from the general account. (z)

**On bill or note.**— Again, if one partner gave to his copartner a bill or note which was in such a form as to bind, not the firm, but the partner who gave it, he might be sued by his copartner thereon, whatever the state of the accounts between the two might be, and although the bill or note in question had reference to some partnership transaction; for, by giving the bill or note, the demand in respect of which it was given was isolated from the general partnership account. (a)<sup>1</sup> An I. O. U.,

account was a proper set-off, and that it was error to refuse testimony showing its amount. *Shenfield v. Dutton*, 85 Ill. 504.

If an agreement of settlement between partners be set aside, in an action upon it, on the ground of fraud in obtaining it, the parties are thereby restored to their original rights and liabilities, and an action of account render will afterwards lie by one against the other. *Leonard v. Leonard*, 1 Watts & Serg. 342.

Where the interest of one partner in the partnership property has been purchased by the other for a gross sum, which purchase was effected by fraud and deception, the party defrauded may repudiate the contract *in toto* and open the account anew, in which case his remedy is in a court of equity. *Chase v. Garvin*, 19 Me. 211; *Hopkins v. Watt*, 13 Ill. 298.

(y) *Fromont v. Coupland*, 2 Bing. 170. See, too, *Lyon v. Haynes*, 5 Man. & Gr. 504, where the sum ascertained to be payable was subject to contingent claims.

(z) This point was raised but not decided in *Carr v. Smith*, 5 Q. B.

128, where the action failed because the account sued on had been made out by a non-partner, and had not been assented to by the partners, and was not stamped as an award.

(a) See *Beechan v. Smith*, E. B. & E. 442; *Neale v. Turton*, 4 Bing. 151; *Preston v. Strutton*, 1 Anst. 50; *Fox v. Frith*, 10 M. & W. 131, and *Heywood v. Watson*, 4 Bing. 496. Compare *Tibaldi v. Ellerman*, 6 Dowl. & L. 71. And as to one partner suing another on a bill which he has indorsed, but not with the intention of paying it, see *Denton v. Peters*, L. R. 5 Q. B. 475.

<sup>1</sup> See *Anderson v. Robertson*, 32 Miss. 241; *Powell v. Graves*, 9 La. Ann. 435; *Gibson v. Moore*, 6 N. H. 547; *Sturges v. Swift*, 32 Miss. 239; *Lyon v. Malone*, 4 Port. 497; *Mitchell v. Wells*, 54 Mich. 127. See, also, *Miller v. Andres*, 13 Ga. 366. See, however, *Buell v. Cole*, 54 Barb. 353.

So even though the note is for the use of the firm. *Anderson v. Robertson*, and *Mitchell v. Wells*, *supra*. See, also, *Bonnafee v. Fenner*, 14 Miss. 212; *Mahan v. Sherman*, 7 Blatchf. 378.

A negotiable promissory note by



being evidence of an account stated, might be sued upon by one partner against another accordingly. (b)

a firm to one of its partners may be enforced against the firm in the hands of a *bona fide* holder, regardless of the state of the account of that member; but, in the hands of one who stands in the shoes of the original payee, such note cannot be made the basis of an action at law against the firm or remaining partners. *Thompson v. Lowe*, 111 Ind. 272.

Where the name of a firm is signed by one of two partners to a note payable to the other, it is, in effect, merely the note of the former to the latter, and the payee may sue the administrator of the other partner on the note and recover the whole amount, as a court of law could not apportion the debt. *Morrison v. Stockwell*, 9 Dana, 172.

Where it is ascertained by partners who are about closing their partnership concerns that a balance will be due one of them on a final settlement, although the exact amount of such balance cannot be ascertained, yet, if the debtor partner gives the creditor partner a promissory note for a sum not exceeding the amount of the balance which will be due on a final settlement, such note is given on a good and sufficient consideration, and payment thereof may be enforced by action at law, though the balance is not struck between the partners. *Rockwell v. Wilder*, 4 Metc. 556.

If two partners, upon a settlement of private and partnership accounts which exist between

them, find that a balance of the private accounts is in favor of one of them, and a smaller balance of such of the partnership accounts as are considered and adjusted is in favor of the other, and a note is accordingly given for the balance so found of the private accounts, after deducting the balance so found of the partnership accounts, an action may be maintained upon the note, although other unadjusted partnership accounts exist between them. *Currier v. Hale*, 5 Allen, 561.

A balance which may be due on a settlement of a partnership cannot be set up in equity against a note given by one partner to another, and now in the hands of an assignee, on the ground that the assignor had left the state, leaving no property in the state, where the note was not in any way connected with the partnership, and the assignment was made prior to the removal of the assignor. *Pool v. Delaney*, 11 Mo. 570.

The surviving partner of a firm undertook to settle the firm's affairs, took part of the partnership stock, gave his notes to the executors of his deceased partner, and paid all, except one, of said notes. A suit was commenced on the note which remained unpaid. *Held*, on a bill in equity by the surviving partner, praying for an injunction upon the proceedings on said note, and alleging that he had overpaid the executors, that the subject-matter of that part of the bill did not relate to the deal-

---

(b) *Graves v. Cook*, 2 Jur. N. S. 475, Ex.

**Action for rent.**—Upon precisely the same principle, if a partner leased property to trustees for the firm, and those trustees covenanted

ings of the copartners, and that the court had no jurisdiction. *Burditt v. Grew*, 8 Pick. 108.

It is no defense at law to a suit on a promissory note given to a retiring partner by a new firm, to one of whom he transferred his interest in the firm, that such payee had collected moneys belonging to the firm and failed to account for the same. *Burney v. Boone*, 32 Ala. 486.

The defendant, in an action brought against him to recover the amount due upon a promissory note, alleged that the plaintiff and himself were copartners; that the partnership accounts were unsettled; that, upon a settlement, the plaintiff would be found largely indebted to defendant; that plaintiff was insolvent, and that defendant would be irreparably damaged by being compelled to pay plaintiff the amount of the note. *Held*, that these averments, if true, afforded good grounds for invoking the equitable powers of the court to settle the partnership accounts before trying the legal issues involved in the case. *Foulks v. Rhodes*, 12 Nev. 225.

An answer to a suit upon a promissory note against the maker and indorser averred that the note grew out of certain partnership transactions between plaintiff and one of the defendants which had proved unsuccessful; that it was indorsed by the other defendant with the understanding that it was to be paid only in event that the partnership turned out prosperously; that the accounts of the

concern were still unsettled, and the maker of the note had paid more than his share of the losses. There was a prayer that the excess of his payments might be allowed as a set-off against the note, and for judgment for the balance. It was not averred that plaintiff was insolvent, and no other ground for equitable relief was stated; neither was an account of the partnership affairs stated or prayed for. *Held*, that the answer did not state a good defense for either defendant. *Jones v. Shaw*, 67 Mo. 667.

One partner gave his note to another for his interest in land in defense to a suit on it; he alleged that his partner had deceived him in the division of the partnership stock, and was indebted therefor in as great or greater amount than the sum due on the note. *Held*, that, as the division had nothing to do with the consideration of the note, it could not be set up as a counter-claim or defense, and that all the answer, except so much as admitted the execution of the note and denied the indebtedness, should be stricken out. *Case v. Maxey*, 6 Cal. 276.

Where a promissory note is given by one partner, with sureties, to his copartner, as a guaranty that the interest of the latter in the firm shall not suffer by reason of the failure of the first, to pay certain indebtedness for which the firm property is liable, upon breach of the contract the payee of the note can only recover on the note such damages as he has sustained as a partner, and this cannot be

to pay the rent, he might sue them on that covenant, although he might, as one of the firm, be bound to indemnify the trustees against all

ascertained in a court of law. A final settlement of the partnership accounts is an essential basis for the measure of damages in such a case. *Smith v. Riddell*. 87 Ill. 165.

Where one of two partners, being indebted to the firm, gives his note to the other for his proportion of the debt, it is a proper set-off in an action upon a bond executed upon dissolution of the firm by the payee of the note to the maker, conditioned for the payment of the partnership debts. *Merrill v. Green*, 55 N. Y. 270.

A member of a partnership dealing in real estate made a note payable to a third person, which became the property of the company; and in the distribution of the proceeds the note was delivered to another member to collect, retain from it his share, and pay the residue to the treasurer. *Held*, that the party receiving the note could maintain an action thereon in the name of the payee for his own use. *Bowland v. Boozer*, 10 Ala. 690.

A. gave B. his note, the consideration of which was two-thirds of the profits arising from a partnership formed by A. and B. B. appropriated one-half instead of one-third of said profits. B.'s assignee after maturity sued A. on the note. *Held*, that A. was entitled to be credited with the excess over one-third of the profits. *Carter v. Christie*, 30 Ga. 813.

One partner cannot maintain an action against his copartner as indorser of a bill of exchange purchased by the company with their

own bills, and indorsed to them in blank, the indorsement being filled up payable to one, but it not appearing that the partnership does not own the bill. *Tipton v. Nance*, 4 Ala. 194.

If one partner contribute for his share in the partnership the bond of another partner which, according to the articles of agreement, is returned to the obligee on the dissolution of the partnership, no stranger to the transaction can impeach a judgment obtained on the bond. *Cunningham v. Ihmsen*, 63 Pa. St. 351.

An indorsee of the note or bill of a firm to one of its members may maintain an action on the note or bill against the makers or drawers. *Davis v. Briggs*, 39 Me. 304; *Hazlehurst v. Pope*, 2 Stew. & Port. 259; *McChesney v. Kipp*, 66 Ill. 460. See, also, *Baring v. Lyman*, 1 Story, 396.

Where three members of a firm gave their joint and several promissory note, payable to the firm, and the firm subsequently indorsed the note to a third person, such third person will hold the note as an individual claim against the makers, as distinguished from a partnership claim, having the right to hold the firm also liable, not as makers, but as indorsers; and this individual character of the claim against the makers will not be in the least modified or changed by the fact that the note has been reduced to judgment against them. *Union National Bank v. Bank of Commerce*, 94 Ill. 271.

A partner who has made a prom-

losses sustained by them in that character, and the trustees might themselves be members of the firm; for the covenant to pay the rent constituted a demand distinct from all others. (c)

**For money received to plaintiff's use.**—Again, if one partner received money for the use of the firm in respect of some transaction separate and distinct from its other business, and the money thus received ought to have been divided without reference to other matters, his copartners might sue him at law for their shares of the money in question. (d)<sup>1</sup>

[\*566] **\*For money placed in defendant's hands for a particular purpose.**—So, if one partner paid money of his own to his copartner, in order that it might be applied by him for some specified partnership purpose, and it was received for that purpose and no other, and was misapplied, an action lay for the recovery of such money; for, *ex hypothesi*, it never was the money of the firm, and the duty of the partner who received that money was either to apply it as agreed, or to return it intact. (e)

**Actions for money paid under mistake as to accounts.**—So a purchaser of a partner's share at a price calculated on the profits could recover the amount which he had overpaid in ignorance of the real state of the accounts. (f)<sup>2</sup>

issory note to the partnership as evidence of the amount drawn out of the firm by him, and afterwards, upon dissolution of the partnership, assigned all his interest in the property and debts of the firm to his copartner, is not liable to an action on the note by the latter, who has taken the note by indorsement from the partnership when overdue, and with notice of the facts. *Stoddard v. Wood*, 9 Gray, 90.

(c) *Bedford v. Brutton*, 1 Bing. N. C. 399. In such a case, however, a counter-claim would now be set up, and have to be adjusted.

(d) See *Graham v. Robertson*, 2 T. R. 282. In *Ex parte Dodgson*, Mon. & McAr. 445, it was held that one of two sub-partners might prove against the other's estate for half of the profits received by him in respect of his share in the prin-

cipal firm. Compare *Bovill v. Hammond*, 6 B. & C. 149.

<sup>1</sup> If one partner collect a portion of the claims due the firm, and fail to account for the amount so collected in the partnership settlement, he may be sued by the other partner without any impeachment of the settlement or re-adjustment of the partnership accounts. Partners are not forbidden to sue each other at law merely because they are or have been partners, but only when the adjustment of the matter in controversy involves the investigation and settlement of partnership accounts. *Russell v. Grimes*, 46 Mo. 410.

(e) See *Wright v. Hunter*, 1 East, 20.

(f.) *Townsend v. Crowdy*, 8 C. B. N. S. 477.

<sup>2</sup> One partner may maintain an action of *assumpsit* against his co-

**On agreement to indemnify.**— Again, if, in respect of some particular transaction, one partner had expressly agreed to indemnify another, and had not done so, an action might be brought by the latter against the former, inasmuch as the right to be indemnified had, by agreement, been made independent of all other questions between the partners. (*g*) Therefore, where one partner in his own name accepted a bill for a partnership debt, on the faith of a promise by one of the other partners that he would provide funds to pay the bill, and the acceptor was nevertheless compelled to pay it, he was held entitled to recover the whole amount from the other partner. (*h*)

**For contribution in respect of a particular loss.**— Further, if some of a number of partners gave their promissory note for better securing payment of a debt owing by them and their copartners, and one of the makers of the note was compelled to pay the whole amount of it, he was entitled to sue each of the other makers of the note for his proportion of the sum so paid. For, in the case supposed, the right to contribution arose in respect of a matter not involved in the general account, and did not depend upon the circumstance that the makers of the note were partners. This was decided by the court of exchequer in *Sedgwick v. Daniell*. (*i*)<sup>1</sup>

partner, after a dissolution of the partnership, to recover back money paid by mistake on an adjustment of the partnership concerns. *Bond v. Hays*, 12 Mass. 34. See, also, *Beidler v. Shallenberger*, 42 Iowa, 203.

If, however, upon an attempted settlement between partners, the account between them is not correctly stated, an *assumpsit* will not lie to recover the alleged balance; the remedy is by bill in chancery for a settlement of the partnership accounts. *Hanks v. Barber*, 53 Ill. 292.

Action on promissory note given partner by copartner on settlement of firm affairs. Defendant offered to prove, under plea of set-off, that a mistake was made in the settlement, and that plaintiff's share of the rent due defendant from the firm for the use of a store owned by him was accidentally omitted from the settlement. *Held*, that

unless there was an adjustment of these items and a promise to the plaintiff to pay, they constituted no defense at law; and that even if they could in any manner be used as a defense to the action on the note, they were admissible only as showing a failure of consideration and not as a set-off. *Johnson v. Wilson*, 54 Ill. 419.

(*g*) *Coffee v. Brian*, 3 Bing. 54. See, too, *Wilson v. Cutting*, 10 Bing. 436; *Brown v. Tapscott*, 6 M. & W. 119.

(*h*) *Coffee v. Brian*, 3 Bing. 54.

(*i*) *Sedgwick v. Daniell*, 2 H. & N. 319.

<sup>1</sup> If, after the dissolution of a partnership, the several partners sign their individual names to a note for a partnership debt, and one afterwards pays off this note, he cannot maintain an action at law against the others for contribution without showing that the business of the partnership is set-

**For contribution when one has paid more than his share of a debt of the firm.**—However, the decisions did not go to the length of allowing one partner, who had been compelled to pay the whole of a partnership debt, to sue his copartners at law for contribution, in the absence of special circumstances. (*k*)<sup>1</sup>

1. *De Jarnette v. McQueen*, 31 Ala. 230; *White v. Harlow*, 5 Gray, 463; *Haskell v. Adams*, 7 Pick. 59.

If the note of one of two partners, actually given for a partnership debt, be paid by the other member of the firm, the partner so paying the firm debt cannot afterwards, by obtaining a transfer of the note to himself, collect the whole amount of the note of the maker. *Tucker v. Peaslee*, 36 N. H. 167.

(*k*) *Sadler v. Nixon*, 5 B. & Ad. 936. See, too, *Batard v. Hawes*, 2 E. & B. 287; *Helme v. Smith*, 7 Bing. 713, and *Pearson v. Skelton*, 1 M. & W. 504. And compare *Wooley v. Batte*, 2 C. & P. 417; *Osborne v. Harpur*, 1 Smith, 411.

<sup>1</sup> *Harris v. Harris*, 39 N. H. 45; *Lawrence v. Clark*, 9 Dana, 257; *Morin v. Martin*, 25 Mo. 360; *Kennedy v. McFadon*, 3 Har. & J. 194; *Westerlo v. Evertson*, 1 Wend. 532 (a law partnership); *Gridley v. Dole*, 4 N. Y. 487; *Bracken v. Kennedy*, 3 Scam. 558; *Haskell v. Adams*, 7 Pick. 59; *Murray v. Bogert*, 14 John. 318; *Roberts v. Fidler*, 13 Pa. St. 265; *Torrey v. Twombly*, 57 How. Pr. 149; *Succession of Powell*, 14 L. Ann. 425. See *Johnson v. Kelly*, 4 Thomp. & C. 417; *Bumpuss v. Webb*, 1 Stew. 19.

An agreement between two copartners, after dissolution of their copartnership, to the effect that they would "quit even," to avoid the expense of a chancery suit, does not authorize one to maintain an

action at law against the other to recover contribution for a partnership debt subsequently paid. *De Jarnette v. McQueen*, 31 Ala. 230.

A., B. and C. being partners, D., with the consent of A., bought out the interests of B. and C., and became the partner of A. D. agreed with B. and C. to pay their proportion of the outstanding debts of the old firm. After the dissolution of the partnership between A. and D., A. paid the debts of the old firm which D. had agreed to pay. *Held*, that A. could not maintain an action at law to recover the amount of D. *Phillips v. Lockhart*, 1 Ala. 521.

A partner who, in prosecuting the partnership enterprise, has advanced in excess of what was required of him by the terms of the partnership, cannot, in the absence of a contract authorizing it, maintain an action for contribution of the excess without going into a general settlement of the partnership accounts, under proper averments in the pleading. *Merriwether v. Hardeman*, 51 Tex. 436.

H. and S. made a joint purchase of a quantity of goods, each paying one-half of the price. They sold to A. one package of the goods on a credit of five months, and afterwards divided the remainder of the goods between them, and H. paid S. for one-half of the price of the package sold. A having become insolvent, H. brought *assumpsit* against S. to recover one-

But, if one of several projectors of a company was compelled to pay a debt owing by them all, he could obtain contribution from them by an

half the loss arising on the sale. *Held*, a copartnership concern, and an action at law therefore not maintainable without proving express promise to pay. *Halstead v. Schmelzel*, 17 Johns. 80.

*Assumpsit* by the executor of A. against B. to recover the share of losses due from B. on a speculation which had been carried on by A., B. and C., but which had been closed and the losses ascertained. All the capital had been furnished by A. *Held*, that the action was properly brought, and could be maintained without proof of a settlement between A., B. and C. as copartners, and of a promise by B. to pay the amount due to A. in such settlement. *Fry v. Potter*, 12 R. I. 542.

Where, upon a dissolution of partnership, one member of the firm executes to another member a promissory note for the amount found to be due him on settlement, and subsequently pays a debt of the firm not included in the settlement, in a suit on the note the payer may plead as a set-off the payment of such partnership debt, and require the other partner to contribute his proportion of the amount thus paid; and in order to recover it is not necessary that the defendant should prove an agreement by the retiring partner to contribute to the payment of such debt. *Farwell v. Tyler*, 5 Iowa, 535.

Where, upon the dissolution of a partnership and the settlement of its affairs, one partner pays more than his share of the partnership

debts, or pays the other partner a certain sum, for which the latter agrees to pay the former's share of such debts, which sum the latter converts to his own use, there is created an individual liability in favor of the former against the latter, which upon his death will constitute a proper claim against his estate. *Price v. Cavins*, 50 Ind. 122.

If upon the dissolution of a firm there is an oral agreement between the partners that one of them shall take the joint property and pay the joint debts, and after taking the property he fails to pay the debts, the other may voluntarily pay them and maintain an action against the former to recover the amounts so paid by him. *Hunt v. Rogers*, 7 Allen (Mass.), 469.

A partner who, upon the dissolution of the partnership, has received all the partnership assets, and agreed to apply them to the payment of the outstanding debts, for which they are sufficient, is not liable to an action at law by his copartner for the amount of the partnership debt which he has been obliged to pay, without showing a final settlement of the partnership business, or that there are no other debts outstanding. *Shattuck v. Lawson*, 10 Gray (Mass.), 405.

The plaintiff and defendant were partners, and for settlement of their accounts referred them to arbitrators, who awarded that each party pay one-half of the outstanding debts of the firm. The plaintiff paid the whole. *Held*, that he was entitled to recover one-half from the defendant in an action

action at law, although there were unsettled accounts between him and them. (l)

[\*567]

*\*When an action would not lie.*

**General rule that one partner cannot sue another or his personal representative at law in respect of any matter involving the partnership account.**<sup>1</sup>—It is clear from the cases referred to in the last few

at law. *Coleman v. Coleman*, 12 Rich. 183.

Action at law for contribution admissible where the partnership affairs are all settled excepting an accounting and the dealings embrace but few items. *Clarke v. Mills*, 36 Kan. 393.

Where, on the settlement of partnership accounts and the sale of the entire interest of the outgoing partner, such partner expressly promises to pay his proportion of any deficit caused by bad debts of the old firm, an action at law will lie on such promise. *Kellogg v. Moore*, 97 Ill. 282.

Where, on the dissolution of a copartnership between plaintiff and defendant, the latter assumed the liabilities of the firm, and subsequently both were sued by a partnership creditor, and defendant agreed with plaintiff that the latter should pay the debt and that he would repay him the whole amount, *held*, that the plaintiff having paid the debt might recover the amount thereof from the defendant in *assumpsit*. *Foyle v. Bingham*, 4 Rus. & Geld. (Nov. S.) 404.

A partner who on dissolution retains all the firm assets, and in consideration thereof agrees to pay all the firm debts, will be liable at law to his copartner who has been compelled to pay a firm debt by a non-performance of said promise. *Jewell v. Ketchum*, 63 Wis. 628.

Where, after the business of the firm has ceased, one partner pays a judgment rendered on one of the mortgage notes given by the firm, and both join in a deed of the land to the mortgagee as a compromise settlement of the mortgaged debt, the one who paid the money can maintain an action at law against the other for one-half the amount so paid. *Soule v. Frost*, 76 Me. 119.

If the several members of a firm indebted in a certain sum, by mutual agreement apportion that sum among themselves, each promising the others, in consideration of their like promises, to pay a stipulated amount and save them harmless therefrom, this contract is enforceable at law. *Edwards v. Remington*, 51 Wis. 336; S. C. 60 id. 33.

Where, by reason of non-notice of withdrawal, a retiring partner becomes liable for debts subsequently contracted and pays the same, he may recover the sum paid in *assumpsit* against the remaining partners. *Shamburg v. Abbott*, 112 Pa. St. 6.

There must, however, be an actual payment of a firm debt by one partner after dissolution before he can maintain an action for contribution against the other. *Long v. Garnett*, 59 Tex. 229.

(l) *Batard v. Hawes*, 2 E. & B. 287; *Boulter v. Peplow*, 9 C. B. 493.

<sup>1</sup> *Beach v. Hotchkiss*, 2 Conn. 425; *Tolford v. Tolford*, 44 Wis.



pages that there was no such rule as that one partner could not sue another at law in respect of a debt arising out of a partnership transac-

547; *Dewit v. Staniford*, 1 Root, 270; 162; *Myrick v. Dawe*, 9 Cush. 248; *Lamolere v. Caze*, 1 Wash. 435; *Murdock v. Martin*, 20 Miss. 660; *Kennedy v. M'Fadon*, 3 Har. & J. 194; *Ozeas v. Tolman*, 1 Binn. 191; *Welt v. Bird*, 7 Blackf. 258; *Cuviz v. Burnett*, 36 Ind. 103; *Scott v. Caruth*, 50 Mo. 120; *Leidy v. Messenger*, 71 Pa. St. 177; *Sproat v. Crowley*, 30 Wis. 187; *Dehority v. Nelson*, 56 Ind. 414; *Colville v. Gilman*, 13 W. Va. 315; *Lazar v. Pearson*, 59 Me. 561; *Learned v. Ayers*, 41 Mich. 677; *Heavilon v. Heavilon*, 29 Ind. 509; *Shalter v. Caldwell*, 27 id. 376; *Wallace v. Hull*, 28 Geo. 68; *Hall v. Logan*, 34 Pa. St. 331; *Jennison v. Walsh*, 30 Ind. 167; *Fisher v. Sweet*, 67 Cal. 228; *McPherson v. Robertson*, 82 Ala. 459; *Bowzer v. Stoughton*, 119 Ill. 47; *Bishop v. Bishop*, 54 Conn. 232; *Kuhn v. Newman*, 49 Ia. 424 (replevin); *Crow v. Green*, 111 Pa. St. 637; *S. C. 17 Weekly Not. Cas.* 409; *Newberger v. Friede*, 23 Mo. App. 631; *Hope v. Ferris*, 30 U. C. C. P. 520; *O'Neill v. Brown*, 61 Tex. 34; *Broda v. Greenwald*, 66 Ala. 538; *Younglove v. Liebhardt*, 13 Neb. 557; *Price v. Drew*, 18 Fla. 670; *Edwards v. Remington*, 51 Wis. 336; *S. C. 60 id.* 33; *Seelye v. Taylor*, 32 La. Ann. 1115; *Still v. Holbrook*, 23 Hun. 517; *Merriwether v. Hardeman*, 51 Tex. 436; *Stanberry v. Cattell*, 55 Ia. 617; *McHale v. Oertel*, 15 Mo. App. 583; *Meredith v. Ewing*, 85 Ind. 410; *Feurt v. Brown*, 23 Mo. App. 332; *Dowling v. Clarke*, 13 R. I. 134; *Simmons v. Murray*, 13 Daly. 477; *Lang v. Oppenheim*, 96 Ind. 47; *Ivy v. Walker*, 58 Miss. 253; *Crossly v. Taylor*, 83 Ind. 337; *Cockrell v. Thompson*, 85 Mo. 510; *Sharman*

tion, and that this circumstance alone afforded no reason why an action should not be brought by one partner against another. (m) Except,

*v. Quier*, 13 Weekly Not. Cas. 445. See, also, *Grant v. Williams*, 1 Tex. App. (Civ.) 153.

Thus, one partner cannot maintain an action on the case against his copartners for damages to which he himself would be liable to contribute for breach of contract by the partnership. *Crow v. Green*, 111 Pa. St. 637; S. C. 17 Weekly Not. Cas. 409.

One partner is not liable to another for an honest mistake of judgment as to what will be most beneficial to the common interest. *Hall v. Sannoner*, 44 Ark. 34.

An action of tort will not lie by one partner against another for mutilating or converting a promissory note made for the purpose of raising partnership funds until a settlement of joint accounts. *Coulliard v. Eaton*, 139 Mass. 105.

One partner cannot maintain replevin against his copartner for the partnership goods. *Kuhn v. Newman*, 49 Ia. 424. See *Clapham v. Crabtree*, 72 Me. 473.

A common-law action by one partner against another for a breach of the contract of partnership, and counter-claim by defendant, alleging a breach of such contract by the plaintiff, is proper under the practice of New York; but a counter-claim praying an accounting and adjustment of the affairs of the firm is not admissible. *Church v. Spiegelburg*, 24 Blatch. 540.

Even after dissolution an action

will not lie by one partner against his copartner to recover for an amount unadjusted, due out of the firm assets, till the settlement of the firm accounts. *Lang v. Oppenheim*, 96 Ind. 47. See, also, *Miner v. Lorman*, 56 Mich. 212.

An action at law will not lie between a firm and a partner in a matter involving partnership account. *Gardiner v. Fargo*, 58 Mich. 72.

So a partnership firm as a creditor of a corporation cannot maintain an action at law against one of such firm to enforce his individual liability as a stockholder to the creditors of the corporation. *Buchanan v. Meisser*, 105 Ill. 638.

Neither can the assignee of a partner maintain an action at law against the firm, even after dissolution, upon a cause of action arising out of partnership dealings. *Davis v. Merrill*, 51 Mich. 480.

An action at law will not lie by a limited partner against the other members of the firm to recover damages for the failure of the defendants to pay, according to agreement, firm debts out of their own funds, and for the misappropriation of the funds contributed by plaintiff to that purpose, where it does not appear that misappropriation of plaintiff's capital was the cause of the firm's failure, and where it appears that all the debts have been paid. *Childs v. Seabury*, 35 Hun (N. Y.), 548.

Equity and not *assumpsit* is the

---

(m) See *Worrall v. Grayson*, 1 M. & W. 166.

however, in an action of account, it was a general rule that between partners, whether they were so in general or for a particular transac-

appropriate remedy for one whose membership and consequent rights in the profits of a partnership are denied, and to whom no portion of the profits have been set apart. *Pray v. Mitchell*, 60 Me. 430.

If commission merchants, having in their hands a balance in favor of partners who have consigned goods to them for sale, refuse to pay the whole or any part of the amount to either partner without the consent of the other, and afterwards of their own motion transfer the balance upon their books to the credit of one of the partners, without his knowledge, this will not authorize the other partner to maintain an action against his associate to whom this transfer was made to recover one-half of the amount; nor can such action be sustained by proof that subsequently to its commencement the defendant received of the commission merchants the whole amount so transferred to him. *Hill v. Clarke*, 7 Allen, 414.

Where partnership accounts remain unsettled after dissolution, and it is questionable which of the partners will be found indebted to the other, this cannot be settled by a trustee process, nor can that process be maintained against one partner to get at a balance which it is supposed will be found due to the other on an adjustment of the accounts. *Burnham v. Hopkinson*, 17 N. H. 239.

In Iowa it is held that, where a party was garnished who had been a partner of the defendant, and held unpaid accounts belonging to

the firm, judgment should not be rendered against him absolutely for the amount of the defendant's interest in the accounts, but that he should be directed to pay over the sum to which the partner was entitled as it should be collected. *Cox v. Russell*, 44 Iowa, 556.

In the same state it is held that, if a partner is garnished in an action against his copartner, he has a right to deduct from the amount he may owe the latter any liability which he could claim against the copartner in a settlement with him. *Cox v. Russell*, 44 Iowa, 556.

A. and B. were partners, and A. owned a steamboat. The partnership furnished materials and labor to repair and furnish the boat. B., as surviving partner, instituted proceedings *in rem* (against the boat) to procure compensation. *Held*, that such a proceeding could not be sustained in such a case. *Thompson v. Steamboat Morton*, 2 Ohio St. 26.

As no action can be brought by one partner against his copartner upon any partnership transaction unless there has been a settlement of the whole concern or of the claim in question, and a promise of payment, the unsettled dealings of either partner with the firm cannot be set off in an action at law by one partner against the other. *Odiorne v. Woodman*, 39 N. H. 541; *Finney v. Turner*, 10 Mo. 207; *Wiggin v. Goodwin*, 63 Me. 389; *Wright v. Jacobs*, 61 Mo. 19; *Leabo v. Renshaw*, *id.* 292; *Elder's Appeal*, 39 Mich. 474. See *Roberts v.*

tion only, no account could be taken at law; (n) nor (except in an action of account) could one partner sue another at law, unless the cause of

Fitler, 13 Pa. St. 265; *Foulks v. Rhodes*, 12 Nev. 225.

One of the owners of a steam-boat, who were held to be partners in its earnings, became indebted to the firm for services rendered him in his private business; the managing partner assigned the debt to a stranger, who sued on it; the defendant set up that the assignment was without his knowledge or consent, and that he had received no part of the proceeds thereof. *Held*, that he was liable to the plaintiff in an action brought in his own name, and that as the allowance of a set-off claimed by him would involve a general settlement of the whole account, and as it did not appear that he could be injured by its disallowance, that it should be disallowed. *Russell v. Minnesota Outfit*, 1 Minn. 162.

One partner paid the firm debts from his private funds at the other's request, on the latter's promise to repay one-half the amount with interest. *Held*, that after the dissolution of the firm he could offset so much against an independent claim for which his former partner sued him at law; and this although a suit in chancery was pending for an account. *Cilley v. Van Patten*, 58 Mich. 404.

If, after the dissolution of a partnership between A. and B., the parties agree that A. shall pay with his own funds certain debts of B.'s and certain debts of the firm, in discharge of a note which, previously to such agreement, had been

given by A. to B., and the payments be accordingly made, such payments to the amount of the private debts of B., and of half of the partnership debts, thus paid, constitute a good offense to a suit at law on the note. *Griffith v. Hill*, 7 Blackf. 324.

A. purchased the interest of B., a partner in a mercantile concern, became a member of it, undertook to pay all the liabilities of B. as such partner, and to occupy his situation in respect to the partnership. Afterwards A. acquired a note made by the firm previous to his admission. *Held*, that it was competent for A. to maintain an action against any of the makers in virtue of the indorsement to him except B. *Penn v. Stone*, 10 Ala. 209.

A member of a firm which consists of more than two persons is liable to his partners jointly for a sum which, upon settlement, he is found to have withdrawn from the joint funds in excess of his share; and one of them cannot maintain an action therefor in his own name alone, although he has an assignment of all the right and interest of his associates in the assets of the firm. *Wiggin v. Cummings*, 8 Allen, 353.

The fact that a partner who has purchased a negotiable security against the firm cannot enforce the obligation at law affects only the remedy and not the right; and a third person, not a partner, to whom he indorses the same, may

(n) *Bovill v. Hammond*, B. & C. 151. And see *Scott v. McIntosh*, 2 Camp. 238.

action was so distinct from the partnership accounts as not to involve their consideration; (o) nor unless the plaintiff, if he recovered, would be justified in keeping what he might get without afterwards having to account to his copartners for any part of it. (p) Hence one partner could not sue another at law for work and labor done for the firm, and therefore on account as well of the plaintiff as of the defendant; (q)<sup>1</sup> nor for money had and received for the firm, for it must be properly shared between the parties to the action; (r) nor for money paid to the use of the defendant, if the question whether he ought to repay it or not turned on the state of the partnership accounts; (s) nor for money lent to the firm of which the plaintiff was himself a member, for the advance only formed an item in the partnership account; (t)<sup>2</sup> nor on a bill or note

maintain an action thereon against the firm. *Kipp v. McChesney*, 66 Ill. 460; *Davis v. Briggs*, 39 Me. 304; *Hazlehurst v. Pope*, 2 Stew. & Port. 259; *Pike v. Hart*, 3 La. Ann. 868. See, also, *Russell v. Minnesota Outfit*, 1 Minn. 162; *Roberts v. Ripley*, 14 Conn. 543.

The individual members of a commercial firm may execute a valid note and a valid mortgage securing said note on their individual property in favor of the firm; and any third person acquiring the note from the firm in good faith for value and before maturity may enforce its payment. *Pike v. Hart*, 30 La. Ann. 868.

A note by a partnership to one of its members for money borrowed may be enforced at law in the name of an indorsee not a member of the partnership, although the payee be a party defendant and the real owner of the note, in case no reason appears why a judgment at law would not do legal justice between the real parties. *Walker v. Wait*, 50 Vt. 668; *Roberts v. Ripley*, 14 Conn. 543.

(o) *Ibid.*, and see the cases in the six following notes. This rule was held to prevent the *cestui que trust* of a partner from suing the other

partners. See *Goddard v. Hodges*, 1 Cr. & M. 33. *Sed quære*. The same rule would probably have prevented a person entitled to a share of profits from suing at law for them where they had not been ascertained.

(p) *Milburn v. Codd*, 7 B. & C. 421; *Bedford v. Brutton*, 1 Bing. N. C. 405; *Caldicott v. Griffiths*, 8 Ex. 898.

(q) *Goddard v. Hodges*, 1 Cr. & M. 33; *Holmes v. Higgins*, 1 B. & C. 74; *Milburn v. Codd*, 7 B. & C. 419; *Lucas v. Beach*, 1 Man. & Gr. 417.

<sup>1</sup> *Causter v. Burke*, 2 Harr. & G. 295; *Taylor v. Smith*, 3 Cranch, C. Ct. 241.

(r) *Bovill v. Hammond*, 6 B. & C. 149; *Smith v. Barrow*, 2 T. R. 476; *Fromont v. Coupland*, 2 Bing. 170. See, too, *Lewis v. Edwards*, 7 M. & W. 300; *Thomas v. Thomas*, 5 Ex. 28.

(s) *Robson v. Curtis*, 1 Stark. 78. But see *Townsend v. Crowdy*, 8 C. B. N. S. 477, noticed *ante*, p. 566.

(t) *Perring v. Hone*, 4 Bing. 28; *Colley v. Smith*, 2 Moo. & Rob. 96.

<sup>2</sup> One member of a firm cannot sue the others for advances made by him on account of the firm; and, in such case, a bill in equity is as

drawn, accepted or indorsed in such a manner as to bind the firm jointly and not its members severally also, for in such a case not only must the plaintiff as one of the firm have contributed to payment of the instrument, but he ought also to have been a defendant in the action. (*u*)

[\*568] For similar reasons, \*if partners became indebted to a third person who died, and appointed one of them his executor, this one could not, even as executor, sue his copartners for the debt due to the deceased; (*x*)<sup>1</sup> and if there were two firms with a partner common to both, one firm could not sue the other at law; (*y*) neither was there any mode by which at law one partner could sue the *firm* or be sued by it. (*z*) But

necessary to settle the accounts as in the case of any other partnership account. *Mickle v. Peet*, 43 Conn. 65; *Bracken v. Kennedy*, 3 Scam. 558; *Hennegin v. Wilcoxon*, 13 La. Ann. 576; *Crottes v. Frigerio*, 18 id. 283; *Gridley v. Dole*, 4 N. Y. 486; *Merrewether v. Hardeman*, 51 Tex. 436; *Halderman v. Halderman*, 1 Hempst. 559; *Seighortner v. Weissenborn*, 20 N. J. Eq. 172.

An action will not lie upon a written instrument executed by the defendant acknowledging receipt from the plaintiff of money "placed to the credit of our account," unless the plaintiff proves that no unsettled partnership existed at the time. *Houston v. Brown*, 23 Ark. 333.

In case, however, of an express promise by one partner to repay to the other his share of advances made by the latter on account of partnership business, the amount of such share becomes the debt of the promisor, recoverable by direct action therefor, without dissolution of the partnership or adjustment of the partnership accounts. *Gauger v. Pantz*, 45 Wis. 449; *Sprout v. Crowley*, 30 id. 187.

(*u*) See *Neale v. Turton*, 4 Bing. 149; *Mainwaring v. Newman*, 2 Bos. & P. 120; *Teague v. Hubbard*, 8 B. & C. 345, and 2 Man. & Ry.

369; *Tibaldi v. Ellerman*, 6 Dowl. & L. 71.

(*x*) *Moffatt v. Van Millingen*, cited, 2 Bos. & P. 124.

<sup>1</sup>The executrix of a deceased member of a firm cannot recover the amount of a note given by the firm assigned to her, or foreclose a mortgage given by another member of the firm as security for the note. *Lindell v. Lee*, 34 Mo. 103.

The relation of debtor and creditor between the surviving partner and the representative of the deceased partner does not arise until the affairs of the partnership are wound up and a balance is struck. Such balance is to be struck after all the partnership affairs are settled. *Gleason v. White*, 34 Cal. 258; *White v. Waide*, 1 Miss. 263; *Ozeas v. Johnson*, 4 Dall. 434; *Singiser's Appeal*, 28 Pa. St. 524; *Howard v. Patrick*, 38 Mich. 796. See *Frederick v. Cooper*, 3 Iowa, 171; *Shields v. Fuller*, 4 Wis. 102.

(*y*) *Perring v. Hone*, 2 Car. & P. 401, and 4 Bing. 28; *Mainwaring v. Newman*, 2 Bos. & P. 120; *Bosanquet v. Wray*, 6 Taunt. 597; *Jacaud v. French*, 12 East, 317.

(*z*) See, in addition to the cases cited in the last note, *De Tastet v. Shaw*, 1 B. & A. 664, and *Richardson v. The Bank of England*, 4 M. & Cr. 171, 172, *per* Lord Cottenham.

upon a joint and several promissory note a partner might be sued by his copartners or by a firm of which they were members. (a)

**Actions for recovery of partnership goods, etc.**—Again, as one tenant in common of personalty could not sue his co-tenant for the recovery of that property, it follows that one partner could not, by action at law, obtain from his copartner property of the firm wrongfully detained by him. (b)

**Actions for improper sale.**—It was not, however, so clear that if one partner wrongfully sold property of the firm his copartner could not sue him at law either for the wrongful conversion or for a share of the produce of the sale. For although the older decisions were opposed to any such right, (c) it was held in *Mayhew v. Herrick* (d) that a sheriff who, under a *fi. fa.* against one partner, sold goods of the firm, was answerable at law to the assignees of the other partner for one-half of the proceeds of the sale; and it was previously held, in *Barton v. Williams*, (e) that a sale by one tenant in common of the common property gave the other a right to sue him at law for a wrongful conversion. (f) The question, therefore, whether if one partner wrongfully sold the goods of the firm he could or could not be sued at law by his copartners, seems to have turned on whether their demand in respect of this wrongful sale could or could not be regarded as independent of any question of account, so as to bring the case within the exception already noticed.

Moreover, a partner could not maintain and action on a bill of exchange \*drawn by himself on a firm of which he was a mem- [\*569] ber, (g) and this rule applied to all unincorporated companies.

**Actions between two firms with a common partner.**—Nor could an action be brought by one firm against another firm where one or more persons were partners in both firms. (h)<sup>1</sup> Even where the common part-

(a) See *Beecham v. Smith*, E. B. & E. 442, and *ante*, p. 565.

(b) See *Fox v. Hanbury*, Cowp. 445. In *Sharp v. Warren*, 6 Price, 131, it was, however, held that the steward of a friendly society was entitled to recover, at law, a box of money belonging to the society, but run off with by one of its members.

(c) *Graves v. Sawcer*, Sir T. Raym. 15.

(d) 7 C. B. 229. See, too, *Buckley v. Barber*, 6 Ex. 164. And compare *Morgan v. Marquis*, 9 Ex. 145.

(e) 5 B. & A. 395; affirmed on appeal, *Williams v. Barton*, 3 Bing. 129. See, too, *Farrar v. Beswick*, 1 M. & W. 682.

(f) Agreed to by *Maule, J.*, in *Mayhew v. Herrick*, 7 C. B. 247; and by *Wood, V.-C.*, in *Fraser v. Kershaw*, 2 K. & J. 500. But see *per Coltman, J.*, 7 C. B. 246, and *Jacobs v. Seward*, L. R. 5 H. L. 464.

(g) *Neale v. Turton*, 4 Bing. 149. See, too, *Teague v. Hubbard*, 8 B. & C. 345, and 2 Man. & Ry. 369.

(h) See *Moffat v. Van Millingen*, 2 Bos. & P. 124, note; *Mainwaring v. Newman*, id. 120; *Perring v. Hone*, 2 C. & P. 401, and 4 Bing. 28; *Jacaud v. French*, 12 East, 317; *De Tastet v. Shaw*, 1 B. & A. 664.

<sup>1</sup> See *Haven v. Wakefield*, 39 Ill. 509; *Englis v. Furniss*, 4 E. D.

ner was dead, the one firm could not sue the other in respect of contracts entered into between the two firms when he was a partner in each of them; for no legal contract could subsist between a person and those connected with him on the one side, and himself and others connected with him on the other side. (i)<sup>1</sup>

**Trover.**—*Fox v. Hanbury* (k) was the leading authority for the rule that one partner could not sue another at law on the ground that the other detained and used for his own exclusive purposes personal property belonging to the firm; and for the further rule that, if one partner sold such property, neither the other partners nor their assignees in bankruptcy could maintain an action against the purchaser in respect of his detention of the goods purchased. (l)

Smith, 587; *Calvit v. Markham*, 4 Miss. 343; *Rogers v. Rogers*, 5 Ired. Eq. 31.

See, also, *Penrock v. Swayne*, 6 W. & S. 239; *Blaisdell v. Pray*, 68 Me. 269.

Where A. & B. are partners in one firm and B. & C. are partners in another, and A. & B. execute a negotiable note to the firm of B. & C., B. & C. cannot maintain an action against A. *Banks v. Mitchell*, 8 Yerg. 111. See, also, *Penrock v. Swayne*, *supra*.

Where, however, one who is a member of two firms makes a note in the name of one of the firms payable to a member of the other firm, the payee may sue and recover upon it in his own name. *Moore v. Gano*, 12 Ohio, 300.

The Pennsylvania act of April 14, 1838, which allows the same person to be a plaintiff and defendant in a cause, is restricted to cases in which the same individual is a member of two distinct copartnerships. Hence one partner cannot bring *assumpsit* against himself and his copartners instead of account render against them. *Miller v. Knauff*, 2 Pa. Law Jour. Rep. 11; *Hall v. Logan*, 34 Pa. St. 331.

See, also, *Gibson v. Ohio Farina Co.* 2 Disney, 499.

If A. be a partner in both the firms, A. & B. and A. & C., and A. & C. be indebted to A. & B., A. & B. cannot sue C. alone for the partnership debt, under the Pennsylvania act of 1838. *Penrock v. Swayne*, 6 W. & S. 239.

The Pennsylvania act of 1838, giving a remedy at law to parties who are partners of several firms against each other, did not take away the previously existing remedy in equity. *Wentworth v. Raiguel*, 9 Phil. 275.

(i) *Bosanquet v. Wray*, 6 Taunt. 597.

<sup>1</sup> *Miller v. Thorn*, R. M. Charl't. 180. See, however, *Lacy v. Le Bruce*, 6 Ala. 904.

(k) *Cowp.* 445. This case was always followed with approbation. See *Smith v. Stokes*, 1 East, 363; *Smith v. Oriell*, id. 368; *Harvey v. Crickett*, 5 M. & S. 336; *Buckley v. Barber*, 6 Ex. 164; *Harper v. Godsell*, L. R. 5 Q. B. 422.

(l) It seems from *Morgan v. Marquis*, 9 Ex. 145, that, if a solvent partner sells goods of the firm, the purchaser, if he afterwards sells the goods, cannot be compelled to



**Action for share of surplus on dissolution.**— Where a partnership had been dissolved, and the winding up of its affairs had been intrusted to one or two individuals, and they had taken upon themselves the duty of getting in the assets and paying the debts and dividing the surplus, they could not, under ordinary circumstances, be compelled by proceedings at law to pay over that surplus to those entitled to it. (*m*) If, indeed, the accounts had all been taken and the net balance payable to any particular partner had been ascertained, and if such balance clearly ought to be paid over at once, then an action for it might be brought; (*n*) but in other cases recourse must have been had to a court of equity.

hand over any part of the proceeds to the trustee of the insolvent partners. Compare this with *Mayhew v. Herrick*, 7 C. B. 229, and *Buckley v. Barber*, 6 Ex. 164.

(*m*) *Lyon v. Haynes*, 5 Man. & Gr. 504. And see *Lewis v. Edwards*, 7 M. & W. 300, as to a receiver suing for money withheld from him by those who agreed that he should receive and distribute it.

(*n*) See *ante*, p. 564.

OF THE DISSOLUTION AND WINDING-UP OF  
PARTNERSHIPS.

## \*CHAPTER I.

## CAUSES OF DISSOLUTION.

The right to rescind a partnership for fraud has been already considered. (a) A partnership, however, which is incapable of being repudiated by any of its members may be terminated by a variety of events. Disregarding (as not requiring special notice) mutual consent on the part of all the partners, and such events, if any, as by the partnership articles may be specially made grounds of dissolution, the causes of a dissolution of an ordinary partnership may be reduced to the following, viz.:

1. The will of any partner.
2. The impossibility of going on; in consequence of
  - (a) The hopeless state of the partnership business.
  - (b) Insanity.
  - (c) Misconduct.
3. The transfer of a partner's interest.
4. The occurrence of some event which renders the partnership illegal.
5. Death.
6. Bankruptcy.

The consequences of death and bankruptcy will be considered in subsequent chapters; in the present chapter the other four events will be dealt with.

(a) *Ante*, p. 482.

## \*SECTION I.—WILL OF ANY PARTNER.

[\*571]

1. *Right to dissolve.*

Any member of an ordinary partnership, the duration of which is indefinite, may dissolve it at any moment he pleases,<sup>1</sup> and the partnership will then be deemed to con-

<sup>1</sup> See *Carlton v. Cummings*, 51 Ind. 478; *Skinner v. Tucker*, 34 Barb. 333; *McElvey v. Lewis*, 76 N. Y. 373; *Lawrence v. Robinson*, 4 Colo. 567; *Pine v. Ormsbee*, 2 Abb. Pr. (N. S.) 375; *Blake v. Sweeting*, 121 Ill. 67; *Walker v. Whipple*, 58 Mich. 476; *McElvey v. Lewis*, 76 N. Y. 373; *Fletcher v. Reed*, 131 Mass. 312; *Berry v. Folkes*, 60 Miss. 576; *Whiting v. Leakin*, 66 Md. 255; *Blaker v. Sands*, 29 Kan. 551.

Where, by the articles, a partnership is to continue for five years, the presumption is that it remained in force for that length of time, and the burden of showing an earlier dissolution is upon those alleging it. As to what proof is sufficient to rebut such presumption, see *Southern White-Lead Co. v. Haas*, 35 N. West. Rep. (Ia.) 494.

Partnership once proved to exist at a certain time will be presumed to continue until a dissolution is proved, but there is no presumption of its existence before the time. *Butler v. Henry*, 48 Ark. 551.

Where the articles of copartnership expressly state that the partnership is to continue until dissolved as the law provides, the partnership is at will only, and may be dissolved at the pleasure of either party without the other's

consent. *Koenig v. Adams*, 37 Kan. 52.

Where one partner refuses to act under the partnership agreement the other may elect to consider it as terminated. *Ligare v. Peacock*, 109 Ill. 94.

A partnership is dissolved, unless equity can interfere, when one of the firm takes exclusive possession and gives notice of the dissolution to the others and to the public. *Solomon v. Kirkwood*, 55 Mich. 256.

A partnership for the completion of a particular enterprise cannot be terminated at the will of one or more of the parties, or by notice given or suit brought. It can only be terminated for some one of the causes recognized by the court as sufficient to authorize them to wind up a partnership. *Hubbell v. Buhler*, 43 Hun (N. Y.), 82. ✓

Where several persons enter into a written agreement to form a general partnership, with the understanding that a subsequent agreement shall be signed more particularly specifying its terms, the partnership will not be dissolved by the failure of one of the parties to sign the latter paper, unless he so intended and the others so accepted his refusal to do so. *Bush v. Bush*, 89 Mc. 360.

Where a partner has retained the right to dissolve the partnership at

tinue only so far as may be necessary for the purpose of winding up its then pending affairs. (b)<sup>1</sup> This rule applies

pleasure, and on a given day orders the books to be balanced for the purpose of ascertaining the interest of the retiring partner, but fails and neglects to pay the sum thus found to be due, and the retiring partner remains in daily attendance and does the business of the firm, precisely as he had always done without complaint of the dissolving partner, the partnership will be held to be continued until the latter has abandoned his position or been driven from it, or the former has done some overt act signifying that the dissolution has already taken place. *Oteri v. Oteri*, 37 La. Ann. 74.

Merely going into chancery to dissolve an insolvent partnership does not dissolve it or vest the assets in the creditors before decree. *Naglee v. Minturn*, 8 Cal. 540; *Marye v. Jones*, 9 Cal. 335.

The filing of an attachment bill by one member of a firm against the others has been held to dissolve the firm; not so where a creditor files the bill and attaches the property of the firm. *Foster v. Hall*, 4 Humph. 346.

A partnership to continue during the pleasure of the contracting parties is strictly a partnership at will. But to enable one partner to dissolve such a partnership at will the renunciation must be made in good faith and not at an unreasonable time. *Howell v. Harvey*, 5 Ark. 270.

Renunciation is held not to have been made in good faith where one partner renounces in order to appropriate to himself the profits

which the firm is entitled to receive. *Howell v. Harvey*, *supra*.

And it is made at an improper time when the things are no longer entire that were of consequence to the partnership, and which should have deferred the dissolution. *Howell v. Harvey*, *supra*.

But such determination cannot operate to defeat rights accrued under it while it was in force. *Lawrence v. Robinson*, 4 Colo. 567.

The partner who breaks off the partnership with an unfair design or for selfish objects discharges his copartners from all liabilities to him under the articles, but does not thereby free himself from his obligations to them. *Howell v. Harvey*, 5 Ark. 270.

Two partners cannot bind a third by an agreement for the dissolution of the partnership and the repayment of the funds advanced by one of the two, the third partner not being a party thereto. *Gansevoort v. Kennedy*, 30 Barb. 279.

Where a partnership is liable to be dissolved at the will of either party, the consequence of such dissolution is to throw the winding up of their partnership affairs into a court of equity, unless they agree on the mode of settlement. *Stevens v. Yeatman*, 19 Md. 480.

(b) *Peacock v. Peacock*, 16 Ves. 50; *Featherstonhaugh v. Fenwick*, 17 Ves. 298; *Crawshay v. Maule*, 1 Swanst. 508; *Ex parte Nokes*, cited 1 Mont. Part. 108, n. The Scottish law is the same. See *Marshall v. Marshall*, 3 Ross, L. C. on Com. Law, 611.

<sup>1</sup> Until the affairs of a partnership

to ordinary mining partnerships; (*e*) and as well where there are many as where there are only a few partners. (*d*) It also applies although one of the partners to whom the notice is given may be a lunatic. (*e*)

But it is apprehended that the court will restrain an immediate dissolution and sale of the partnership property if it appears that irreparable mischief will ensue from such a proceeding. (*f*)

But although a partnership at will may be dissolved by any partner, it by no means follows that he can retain a premium which his copartner may have paid him, or secure for his own benefit other advantages which he may desire. (*g*)<sup>1</sup>

**Form of notice.**—A notice that the partnership shall be dissolved must, to be effectual, be explicit, and be communicated to all the partners. (*h*) The notice may be prospective. (*i*) A proposal to \*dissolve on terms [\*572] which are not accepted does not amount to a dis-

are settled and outstanding engagements made good the partnership must, in contemplation of law, have a continuance so far as respects the winding up of the concern. *Brown v. Higginbotham*, 5 Leigh, 583.

(*c*) *Lees v. Jones*, 3 Jur. N. S. 954. But not, it is conceived, if carried on on the cost-book principle.

(*d*) *Miles v. Thomas*, 9 Sim. 606.

(*e*) But in such a case the dissolution cannot be carried out without having recourse to an action. See *Mellersh v. Keen*, 27 Beav. 236.

(*f*) See *Chavany v. Van Sommer*, 3 Woodd. Lect. 416, note, and 1 Swanst. 512, note, and *Blisset v. Daniel*, 10 Ha. 493. See, also, *Neilson v. Mossend Iron Co.* 11 App. Ca. 298, a Scotch case. By the civil law a dissolution made *mala fide*, and at an unseasonable time,

is not allowed. See *Pothier, Partn.* § 150.

(*g*) As to the premium, see *ante*, p. 64, and as to retaining the benefit of a renewed lease, *Clegg v. Edmondson*, 8 De G. Mc. & G. 787.

<sup>1</sup>The fact that upon entering into the partnership one of the partners paid a bonus for a goodwill established by the other partner will not prevent the latter from dissolving the partnership at any time or render him liable to the former for damages for such dissolution. *Carlton v. Cummings*, 51 Ind. 478.

(*h*) *Van Sandau v. Moore*, 1 Russ. 463; *Wheeler v. Van Wart*, 9 Sim. 194, and 2 Jur. 252, where the notice was left at the office; *Parsons v. Hayward*, 31 Beav. 199, and 4 De G. F. & J. 474.

(*i*) *Mellersh v. Keen*, 27 Beav. 236.

solution. (*k*)<sup>1</sup> Nor does a notice that a partner's share has been forfeited; for by such notice it is not intended that the partnership shall be considered as dissolved as to all the partners, but only that the one partner shall have no further interest in it. (*l*) An answer to a bill in chancery has been held sufficient notice. (*m*).

**Where partnership is constituted by deed.**—It has never been determined that a partnership constituted by deed can only be dissolved either by deed or by operation of law; and it is apprehended that no deed is requisite.<sup>2</sup> In *Doe v.*

(*k*) *Hall v. Hall*, 12 Beav. 414.

<sup>1</sup>One member of a firm gave notice to his copartner that the connection between them was dissolved, but this was not assented to by the copartner, and the parties did not afterwards act upon it. *Held*, that it did not operate a dissolution of the firm. *Sanderson v. Milton Stage Co.* 18 Vt. 107.

Where, under articles of partnership prescribing a definite time for the continuance of the partnership, one of the partners serves upon his copartner a notice that he has dissolved the partnership, such notice cannot be construed as an offer to dissolve so as to be accepted by an allegation contained in an answer in a subsequent action by such partner against his copartner, whereby the latter declares himself desirous to dissolve the partnership. *Smith v. Mulock*, 1 Robt. (N. Y.) 569; 1 Abb. Pr. N. S. 374.

The following notice of the dissolution of a copartnership was published: "B. having disposed of his interest in the firm of A. & Son to A., the firm is this day dissolved. A. assumes all the liabilities of the old firm, and for such purpose will use its name,

and to whom all debts due to the firm will be paid." This paper was signed by A. and B. *Held*, that this paper was itself, if made *bona fide*, a written dissolution of the partnership, and a transfer in writing by B. of all his interest in its effects to A. *Armstrong v. Fahnestock*, 19 Md. 58.

(*l*) See *Hart v. Clarke*, 6 De G. M. & G. 232.

(*m*) *Syers v. Syers*, 1 App. Ca. 174.

<sup>2</sup>Where articles of copartnership under seal provide for a dissolution by mutual consent such dissolution may be shown by parol. *Truesdell v. Baker*, 2 Rich. 351.

Though a partnership be formed by an agreement under seal, still a dissolution actually made by the parties, though not under seal, before the period limited by the agreement for the continuance of the partnership expires, will, in a court of equity, be effectual as between the partners themselves, and as to third persons having notice thereof. *Wood v. Gault*, 2 Md. Ch. 433.

The dissolution of a partnership, formed in writing when it might have been verbally, may be shown by parol. Such evidence no more

*Miles* (*n*) the question was raised, but as the partners had all signed a notice advertising a dissolution, Lord Ellen-

contradicts the act than parol proof of payment does a promissory note. *Gardiner v. Bataille*, 5 La. Ann. 597.

Partnerships formed by parol may be dissolved by parol, and the partner's joint declarations, orally made to the public, are admissible to show such dissolution, though not conclusive. *Cregler v. Durham*, 9 Ind. 375.

The dissolution of a copartnership may be proved by parol, and a certificate signed by one of the copartners, to the effect that he has purchased the interests of the others, is competent evidence as corroborative of the contract to dissolve. *Emerson v. Parsons*, 46 N. Y. 560.

A valid agreement for a partnership may be made by parol, though for the purpose of dealing in real estate, or for carrying on the business of mining; and a parol agreement for dissolution or settlement of such partnership is valid and may be enforced. *York v. Clemens*, 41 Iowa, 95; *Holmes v. McCray*, 51 Ind. 358.

A. and H. were partners in a herd of cattle which were pastured on a public range. In June, 1869, they dissolved the partnership, and corraled and divided all the cattle they could find, and agreed that H. should retain the partnership brand, and A. the partnership ear-mark, and that any cattle which

had the partnership brand and ear-mark after the expiration of one year should belong to A., and that, in the meantime, they should make divisions, and alter the ear-mark of cattle coming to H. and the brand of those coming to A. *Held*, that all that was to be done under the contract was to be performed within one year, and that it was not, therefore, in violation of the statute of frauds. *Hoare v. Hindley*, 49 Cal. 275.

Where an instrument prepared by one partner for signature by his copartner, with whom he has fallen out and quarreled, contains mutual releases and assignments — each being the consideration of the other — it should, in order to be binding, be signed by both parties. The fact that the partner who did not prepare it has taken, without objection from the other, an unsigned counterpart after his other partner had signed the first counterpart and left it in the hands of a third person to be delivered only when the unsigned counterpart was signed and delivered, does not give effect to the release. *Ambler v. Whipple*, 20 Wall. 546.

Upon the dissolution of a copartnership between the plaintiffs and the defendant the former executed an instrument to which the latter was not a party at the time, reciting his withdrawal from the firm, and providing for his receiving

---

(*n*) 4 Camp. 373, and 1 Stark. 181. In *Hutchinson v. Whitfield*, *Hayes* (Ir. Ex.), 78, it was agreed that the partnership should be dissolved by

deed only; but it was held that an award dissolving the partnership was valid, the submission being under seal.

borough presumed that it had been effected with all due solemnity. It is clear from the report that there was, in fact, no deed of dissolution, but there may have been in the articles some clause providing for a dissolution otherwise than by deed.

certain sums of money and notes, and fixing his liability to share in certain eventual losses of the old firm. Four days after the date of this instrument the defendant executed a receipt acknowledging the reception of certain notes and cash under the agreement in question. *Held*, that the effect of this receipt was to subject the rights and liabilities of the defendant as effectually to the operation of the preceding instrument as if he had signed it. *Buchanan v. Cheseborough*, 5 Duer, 238.

The articles of an association, providing that "any member, by surrendering his certificate of membership to the store-keeper, may draw from the store in goods a sum not exceeding \$4, such certificate to be returned when the amount thus drawn shall have been paid, if paid within thirty days," were *held* to furnish a method by which a member could withdraw from the association and be absolved from all liability as between himself and the association, considering the objects of the association and the fact that any one might become a member, with the consent of the directors, on payment of \$5. *Stimson v. Lewis*, 36 Vt. 91.

If, upon dissolution, one or more of the partners agree to take the assets of the firm and assume all its liabilities, and it turns out that they have made an improvident contract, a court of equity will not

relieve them of their own voluntary act. *Bankhead v. Alloway*, 6 Coldw. 56.

Where one partner is bound to attend personally to the business of the firm and afterwards becomes infirm in mind by reason of intemperance, a court of equity will not be authorized to set aside an agreement then made for the dissolution of the concern on the ground of fraud and imposition, when that is to be inferred only from the fact that profits have been realized when loss was anticipated. *Atwood v. Smith*, 11 Ala. 894.

As to the reformation in equity of an agreement for a dissolution, see *Leroy v. Lowber*, 1 Abb. Pr. 67.

Two partners agreed in writing to dissolve, and that one should leave and renounce the signature of the house, and the other assume the business and the settlement of debts and be responsible to the retiring partner for what should be coming to him. *Held*, not a mere assignment in trust to convert the assets to money and pay the retiring partner his share. The remaining partner became owner of the assets and was personally responsible to the other, but not as a trustee. *Weber v. Defor*, 8 How. Pr. 502.

An instrument, given by one partner to his copartners, certifying that he had purchased their interest in the firm, and agreeing to assume all liabilities of the firm and



**Dissolution inferred.**—A dissolution of a partnership at will may be inferred from circumstances,<sup>1</sup> *e. g.*, a quarrel, although no notice to dissolve may have been given. (*o*)

**Withdrawal of notice.**—A notice once given cannot be withdrawn without consent. (*p*)

**Time from which dissolution dates.**—If a partnership is a partnership at will, and a member brings an action for dissolution without any previous notice, the writ is treated as notice to dissolve and the dissolution will date from its service. In other cases of dissolution by notice the dissolution

hold them harmless, is some evidence that the partnership was dissolved on the day of its date. *Emmerson v. Parsons*, 2 Sweeney, 447.

<sup>1</sup>Certain transactions between partners held to amount to a dissolution. *Hamilton v. Hamilton*, 1 Russell's Eq. (Nov. S.) 78.

Refusal by one partner to furnish supplies for the manufacture of lumber, and by the other to ship any more lumber to the first, no partnership business being done thereafter by either, recognizing the partnership as existing, *held*, to amount to a dissolution. *Ligare v. Peacock*, 109 Ill. 94.

Evidence that A. and B. were partners in the spring of 1835, and continued doing business under the firm name of A. & B. until July or August of the same year, and that the firm was then discontinued and a new one formed under the style of A., B. & Co., who continued to do business in the same store occupied by A. & B., is evidence tending to prove a dissolution of the partnership of A. & B. *Southwick v. Allen*, 11 Vt. 75.

Certain members of a firm formed a new partnership, and immediately

opened an account against one of the others, whose name ceased to appear on the books after the settlement of the account, a year following. He died about seven years after the formation of the new firm, never having claimed any interest in the partnership after that time, and there was no evidence that he considered himself or was considered by others as a partner. By the said settlement he discharged, a year before its maturity, his proportion of a debt which, had he continued a partner, he would have been entitled when it became due to set off his proportion of the profits of the partnership property. *Held*, that under the circumstances the court would presume that his interest in the partnership was relinquished. *Gover v. Hall*, 3 Har. & J. 43.

Whether the facts proved amount to a dissolution of the partnership is a question for the jury, and it is error for the court to decide it. *Roache v. Pendergast*, 3 Har. & J. 33.

(*o*) *Pearce v. Lindsay*, 3 De G. J. & Sm. 139.

(*p*) *Jones v. Lloyd*, 18 Eq. 265.

will date from the day the notice was given, or from the time mentioned in it for dissolution, as the case may be. (q)

[\*573]

\*2. *Of the right to retire.*

**Right of partner to retire from firm.**—Subject to a qualification which will be presently mentioned, a member of an ordinary firm can surrender his share and interest in the firm to his copartners, or any of them, upon any terms to which he and they may all agree. But there is only one method by which a partner can retire from a firm without the consent of his copartners, and that is by dissolving the firm. In order to avoid the necessity of a general dissolution when a partner may wish to retire, special provisions are frequently introduced into partnership articles; but it is not unfrequently found that, owing to unforeseen circumstances, these provisions cannot be carried into effect; and when that is the case, a dissolution, with its usual consequences, must take place if a partner is to retire otherwise than by the consent of his copartners. (r)

**Right to retire from insolvent firm.**—The qualification above alluded to has relation to a partner's retirement from an insolvent firm. A partner desirous of retiring from an insolvent firm is at perfect liberty to sell his interest in it for any sum the continuing partners think proper to give him; and a sale by him to them cannot be set aside or impeached as a fraud upon the creditors of the firm unless there be clear evidence *aliunde* of such fraud. (s) At the same time, the present share of a partner in an insolvent firm (t) is obviously less than nothing, whatever may be the

(q) See *Robertson v. Lockie*, 15 Ha. 581; *Pettyt v. Janeson*, 6 Sim. 285; *Bagshaw v. Parker*, 10 Madd. 146.  
 Beav. 532; *Mellersh v. Keen*, 27 Beav. 236.

(r) See *Cook v. Collingridge*, Jac. & C. 257; *Ex parte Birch*, 2 Ves. J. 260, note; *Ex parte Carpenter*, Mont. & McAr. 1.

495; *Downs v. Collins*, 6 Ha. 418. (t) An insolvent firm is one in which the joint assets are less than

amount of the capital brought in by him. Consequently a partner who retires from an insolvent firm and withdraws from it a sum of money which he is pleased to call his share is defrauding the creditors of the firm; and such a transaction cannot stand, and may be impeached by the trustee in bankruptcy of the \*continuing firm. (u) [\*574] To proceedings instituted by the trustee to impeach such a transaction it is no answer to say that the bankrupts themselves were bound by it; for the trustee represents the creditors, and can impeach any transaction which is a fraud as against them, although the bankrupts themselves might not be in a position to do so. (x) Upon similar grounds, if a partner relinquishes his share in a partnership to his copartners, upon such terms and under such circumstances as to render that relinquishment a fraud upon his creditors, and he then becomes bankrupt, his trustee will be entitled to rescind the transaction.

**General rules as to retiring.**—Laying aside, however, all such considerations as these, it may be said:

1. That it is competent for a partner to retire with the consent of his copartners at any time and upon any terms.

2. That it is competent for him to retire without their consent by dissolving the firm, if he is in a position to dissolve it.

3. That it is not competent for a partner to retire from a partnership which he cannot dissolve, and from which his copartners are not willing that he should retire.

### 3. *Of the right to expel.*

**Right to expel a partner.**—In the absence of an express agreement to that effect, there is no right on the part of any of the members of an ordinary partnership to expel any

the joint liabilities. Such a firm is insolvent whatever the wealth of the individual partners composing it may be. See *Mont. & McAr.* p. 5. Bro. C. C. 423, and 2 Ves. Jr. 244; *Re Kemptner*, 8 Eq. 286; and *ante*, p. 338. (x) *Ibid.* And see *Billiter v. Young*, 6 E. & B. 40; *Tyrrell v.*

(u) See *Anderson v. Maltby*, 4 Hope, 2 Atk. 562.

other member. Nor, in the absence of express agreement, can any of the members of an ordinary partnership forfeit the share of any other member, or compel him to quit the firm on taking what is due to him. As there is no method, except a dissolution, by which a partner can retire against the will of his copartners, so there is no method except a dissolution by which one partner can be got rid of against his own will. (*y*)

[\*575] **\*Driving a partner to a dissolution.**—The consequence of this is that when partners disagree and cannot dissolve, except with the concurrence of all, it is not unusual for some of them so to conduct themselves towards another as, if possible, to drive him to agree to a dissolution. But it need hardly be said that a scheme of this kind will, if possible, be frustrated; and redress may be obtained in such a case without dissolving the partnership. (*z*)

**Exercise of powers of expulsion.**—With a view to facilitate the removal of a partner who misconducts himself, it is not unfrequently agreed that a power to expel shall be exercisable in certain events and under certain restrictions. These expulsion clauses, as they are termed, have been already alluded to in the chapter on the Construction of Partnership Agreements; but it may be observed in passing that such clauses are always construed strictly, and that no expulsion under them will be effectual unless the expelling partners have acted with perfect good faith. (*a*)

## SECTION II.—IMPOSSIBILITY OF GOING ON.

**Impossibility of going on.**—Even if the duration of the partnership is defined, circumstances may arise giving a

(*y*) See *Hart v. Clarke*, 6 De G. M. & G. 232, and on appeal, *Clarke v. Hart*, 6 H. L. C. 633; *Crawshay v. Collins*, 15 Ves. 226; *Featherstonhaugh v. Fenwick*, 17 id. 309. (*a*) See *Blisset v. Daniel*, 10 Ha. 493; *Wood v. Woad*, L. R. 9 Ex. 190; *Steuart v. Gladstone*, 10 Ch. D. 626; *Russell v. Russell*, 14 id. 471; *ante*, p. 426, etc.

(*z*) See *Fairthorne v. Weston*, 3 Ha. 387; and *ante*, p. 497.

partner a right to have the partnership dissolved before the expiration of the time for which it was originally agreed to last.<sup>1</sup> But there must be some special circumstance to justify a dissolution of a partnership before the term for which it was entered into has expired. (b)<sup>2</sup> Any circum-

<sup>1</sup> A partnership in any business ceases when there is an end to the business itself. *Spurck v. Leonard*, 9 Bradw. 174.

(b) See *Warner v. Cunningham*, 3 Dow. 76.

<sup>2</sup> See the general rules governing the subject stated in *Waterbury v. Express Co.* 50 Barb. 169; S. C. 3 Abb. Pr. N. S. 163.

Where articles of partnership prescribe a specified period of its continuance, no partner can, by any voluntary act, work its dissolution, unless the act be such that the subject-matter of the partnership becomes extinct or the capacity of the partner to give his personal attention is gone. But other voluntary acts may be sufficient to authorize a court to decree dissolution on application of the other partners; and the court may, on the application of even the party committing such acts, decree a dissolution if other causes justify it, and it would be for the benefit of the partnership. *Ferrero v. Buhlmeier*, 34 How. Pr. 33. See, also, *Seighortner v. Weissenborn*, 20 N. J. Eq. 172; *Howell v. Harvey*, 5 Ark. 27.

Although partnership articles contain a clause requiring six months' notice of an intention to dissolve, and a clause providing for arbitration, a court of equity has jurisdiction in a proper case to entertain a bill for an injunction and a receiver. *Page v. Vankirk*, 1 Brews. 282.

It is error to refuse an application for a writ of partition to divide mills which are partnership property, upon the ground that the time fixed for the dissolution by the articles has not elapsed, if there are equitable grounds for such earlier dissolution. *Jackson v. Geese*, 35 Ga. 84.

F. had a contract to carry the United States mail, and the contract expired on the 1st day of July, 1871. About the 1st of January, 1869, M. bought of F. the said contract for \$350, and then sold a half interest therein to C., and M. and C. paid each one-half of the purchase money to F., and agreed between themselves that they would together carry said mail, and share equally in the profits and losses. On the 16th of May, 1870, M. refused to allow C. to have anything further to do with the business, although C. was ready, willing and offered to do his part; and M. then claimed to have dissolved the arrangement between them, claiming that if it was a partnership it was at will, and he could dissolve it at pleasure, and himself carry the mail until the close of the contract. *Held*, 1. That there was a partnership between the parties. 2. That from the acts and conduct of the parties, and other surrounding circumstances, the partnership was to continue for a fixed period, to wit, until the expiration of the contract, which was the sole sub-

stance, however, which renders the continuance of the partnership, or the attainment of the common end with a view to which it was entered into, practically impossible, would seem upon principle to warrant a dissolution. (c) The particular circumstances which have given rise to litigation, and upon which partnerships have been judicially dissolved, are:

- [\*576] \*1. The hopeless state of the partnership business;  
 2. The confirmed lunacy of one of the partners; and  
 3. Misconduct on the part of one or more of the members of the firm and the destruction of mutual confidence.

Each of these grounds of dissolution requires to be more fully noticed.

1. *As to the hopeless state of the partnership business.*<sup>1</sup>

**1. Insolvency.**—In *Baring v. Dia* (d) a partnership was formed between three persons for the purpose of spinning

ject of the partnership. 3. That it was not in the power of M., *sua sponte*, to dissolve the partnership, as he claims he did; and therefore that it continued until it expired by limitation, and M. must account to C. for one-half of the profits accruing therefrom. *Cole v. Moxley*, 12 Gratt. 730.

Where a partnership is formed for a definite term neither partner can file a bill for dissolution of the partnership, or for the appointment of a receiver, before the expiration of the time limited, merely on the ground that he is dissatisfied, or that the partners quarrel. *Henn v. Walsh*, 2 Edw. 129.

But a dissolution will be granted where dissension prevents all hope of advantage. *Bishop v. Breckles*, 1 Hoffm. 534.

A partnership will not be dissolved by decree of court when circumstances render a dissolution inconvenient; *e. g.*, when a large operation has been commenced which cannot be arrested without serious loss. *Richards v. Baurman*, 65 N. C. 162.

Where a dissolution is decreed for breach of the articles of partnership the court may declare at what date the contract of partnership shall be considered at an end. *Dumont v. Ruepprecht*, 38 Ala. 175.

A court of equity may decree the dissolution of a partnership *ab initio* on good cause shown. *Fogg v. Johnston*, 27 Ala. 432.

(c) See *Harrison v. Tennant*, 21 Beav. 482; *Electric Telegraph Co. of Ireland*, 22 Beav. 471.

<sup>1</sup> Wherever the conditions of a

(d) 1 Cox, 213.

cotton under a certain patent. The patented invention proved a failure, and two of the partners thereupon desired to wind up the affairs of the partnership and to sell its mills, but this was opposed by the other partner. However, on a bill filed against him, the court referred it to the master to inquire and state whether the partnership business could be carried on according to the true intent and meaning of the articles of copartnership, and declared that, on a report in the negative, a decree would be made for a dissolution of the partnership and a sale of its property. It does not appear in this case whether the partnership had been entered into for a definite time or not, nor whether the capital of the firm had been expended or not.

**Loss of capital.**—In a more recent and more important case, however, the court recognized the fact that expectation of profit is implied in every partnership, and held that if a partnership is entered into for a term of years, and the capital originally agreed to be furnished has been all spent, and some of the partners are unable or unwilling to advance more money, and at the same time the concern cannot go on except at a loss unless they do, the partnership will be dissolved. (e)<sup>1</sup> Under such circumstances as these it is

partnership are incapable of being fulfilled, or the fruits arising from it cannot be properly enjoyed, a good cause for renunciation is furnished. *Howell v. Harvey*, 5 Ark. 270.

The impossibility of carrying on a joint business profitably upon the basis of the articles of agreement is sufficient to authorize either party to demand a dissolution or rescission. *Brien v. Harri-*  
*man*, 1 Tenn. Ch. 467; *Seighortner v. Weisenborn*, 20 N. J. Eq. 172; *Holliday v. Ellicott*, 8 Oreg. 84. See *Shoemaker v. Smith*, 74 Ind. 71.

A dissolution will be decreed where the whole scheme is found to be visionary, impracticable, or founded upon erroneous principles. *Lafond v. Deems*, 52 How. Pr. 41; *S. C. Abb. N. Cas.* 318; *Seighortner v. Weisenborn*, *supra*.

Simple insolvency, without stoppage of payment, or assignment, or any judicial process, does not work a dissolution of the partnership or divest the partners of their dominion over the partnership property. *Siegel v. Chidsey*, 28 Pa. St. 279; *Arnold v. Brown*, 24 Pick. 89.

(e) *Jennings v. Baddeley*, 3 K. &

<sup>1</sup> In an action brought to recover damages for breach of an agreement to continue a partnership for five years, *held*, that the fact that

unimportant whether the concern is already embarrassed or not. After everything has been done which was agreed to be done, and certain loss is the only result of going on, any partner is entitled to have the concern dissolved, although he may have agreed that the partnership should continue for some definite time and that time has not yet expired. (*f*)

If, in a case of this description, the firm is already insolvent and becomes more and more so every day, the court will interfere on motion, and appoint a person to sell the business and wind up the affairs of the partnership, although it is not usual to grant such relief until the hearing of the cause. (*g*)

**Bankruptcy.**—If a firm of partners, or even any one member of the firm, is adjudged bankrupt, the firm is dissolved; not only because it is impossible for the business of the firm to be carried on, but because there is a transfer of each bankrupt's interest to his trustee. (*h*)<sup>1</sup>

J. 78, a case of a mine. See, also, *Wilson v. Church*, 13 Ch. D. 1, and S. C., under the name of *National Bolivian Navigation Co. v. Wilson*, 5 App. Ca. 176.

(*f*) *Ibid.*

(*g*) *Bailey v. Ford*, 13 Sim. 495.

(*h*) See *post*, p. 583, under the head Transfer of Interest.

<sup>1</sup>See *Griswold v. Waddington*, 16 John. 491; *Marquand v. N. Y. Manuf'g Co.* 17 John. 525; *Gowan v. Jeffries*, 2 Ashm. 296; *Williamson v. Wilson*, 1 Bland, 418; *Halsey v. Norton*, 45 Miss. 703; *Wilkins v. Davis*, 15 N. B. R. 60; *McNutt v. King*, 59 Ala. 597; *Daugherty v. Strauss*, 1 Tex. App. (Civ.) 508; *Talcott v. Dudley*, 5 Ill. 427; *Loveridge v. Larned*, 7 Fed.

Rep. 294; *Blackwell v. Clayton*, 75 N. C. 213.

Bankruptcy of one partner only works a dissolution of the firm to the extent of disabling it from entering into new engagements or assuming new obligations except such as are required to complete its unfinished business and to wind up its affairs. *King v. Leighton*, 100 N. Y. 386; reversing S. C. 22 Hun, 419.

Mere insolvency, in the absence of fraud, will not deprive the partners of their legal control over the assets, or their right to sell and dispose of the same as seems just proper. *Tracy v. Walker*, 1 Flip. C. Ct. 41.

Such insolvency will not, where

the whole capital provided for by the articles of copartnership had been lost was sufficient ground for

a refusal by one of the partners to continue the business. *Van Ness v. Fisher*, 5 Lans. 236.



## 2. *As to the Insanity of one of the Partners.*

**2. Lunacy.**—The lunacy of a partner does not itself dissolve the firm;<sup>1</sup> but the confirmed lunacy of an active partner is sufficient to induce the court to order a dissolution,<sup>2</sup> not only for the purpose of protecting the lunatic, (*i*) but also for the purpose of relieving his copartners from the difficult position in which the lunacy places them. (*k*) In a

no assignment has been executed, dissolve the firm; otherwise in case of an assignment. *Arnold v. Brown*, 24 Pick. 89; *Dearborn v. Keith*, 5 Cush. 224; *Moody v. Rathbun*, 7 Minn. 89; *Conrad v. Buck*, 21 W. Va. 396; *Ogden v. Arnot*, 29 Hun (N. Y.), 146.

Upon the death of one partner and the subsequent insolvency of the survivors the joint estate passes to their assignee in insolvency. *Davidson v. Papps*, 28 Grant, Ch. 91.

The assignee in such case is a tenant in common with the solvent partner in the joint stock. *Wilkins v. Davis*, *supra*; *Halsey v. Norton*, *supra*; *McNutt v. King*, *supra*.

Where, after the bankruptcy of a firm, the partners continued the same kind of business under the same partnership name, and one of them, in the name of the firm, executed a written acknowledgment of a partnership debt discharged by the bankruptcy, *held*, that the other partner was not bound by the acknowledgment, the bankruptcy having dissolved the partnership, and thus put an end to the right of one partner to bind the other; and the business transacted since the bankruptcy being an entirely new partnership. *Atwood v. Gillett*, 2 Dougl. 206.

In an action by partners for the

conversion of partnership property a plea which avers the bankruptcy of one of them is a good and sufficient plea in bar. *McNutt v. King*, 59 Ala. 597.

The transfer by an assignee in bankruptcy of one partner of a mere right of action for the conversion of personal property does not invest the transferee with a legal title; the only effect of the transfer would be to authorize the transferee to sue in the name of the assignee jointly with the solvent partners, and to receive the bankrupt's share of the amount recovered. *McNutt v. King*, *supra*.

<sup>1</sup> *Raymond v. Vaughn*, 17 Bradw. 144. See, however, *Davis v. Lane*, 10 N. H. 161, *per Parkes*, C. J.

An inquisition of lunacy, found against a member of a partnership, *ipso facto* dissolves the partnership. *Isler v. Baker*, 6 Humph. 85.

<sup>2</sup> See *Griswold v. Waddington*, 15 John. 47; *Cape Sable Co.'s Case*, 3 Bland, 674.

(*i*) *Jones v. Lloyd*, 18 Eq. 265.

(*k*) See *Sayer v. Bennet*, 1 Cox, 107; *Wrexham v. Hudleston*, 1 Sw. 514, note; *Jones v. Noy*, 2 M. & K. 125; *Sadler v. Lee*, 6 Beav. 324; *Leaf v. Coles*, 1 De G. M. & G. 171; *Anon.* 2 K. & J. 441; and Lord Eldon's observations in *Waters v. Taylor*, 2 V. & B. 303.

leading case on this subject two persons agreed to become partners as solicitors for twelve years; one of them became lunatic before the twelve years were out, and subsequently died. His copartner continued to carry on the business for some time, but he eventually sold it; and it was held that the legal personal representative of the lunatic was entitled to a share of the profits up to the time of the sale. (*l*) In delivering judgment the court observed:

"It is clear upon principle that the complete incapacity of a party to an agreement to perform that which was a condition of the agreement [\*578] is a ground for determining the contract. The insanity of a partner is a ground for the dissolution of the partnership, because it is immediate incapacity; but it may not in the result prove to be a ground of dissolution, for the partner may recover from his malady. When a partner, therefore, is affected with insanity, the continuing partner may, if he think fit, make it a ground of dissolution; but in that case I consider, with Lord Kenyon, that in order to make it a ground of dissolution he must obtain a decree of the court. If he does not apply to the court for a decree of dissolution, it is to be considered that he is 'willing' to wait to see whether the incapacity of his partner may not prove merely temporary. If he carry on the partnership business in the expectation that his partner may recover from his insanity, so long as he continues the business with that expectation or hope there can be no dissolution."

In *Rowlands v. Evans* and *Williams v. Rowlands*, (*m*) one of three partners in a mine had become lunatic and committees of his estate had been appointed. A bill was filed by one of the sane partners for a dissolution; and a cross-bill was filed by the committees of the lunatic, for the appointment of a manager, on the ground that the affairs of the partnership could be carried on advantageously to all parties, notwithstanding the lunacy. There was evidence to show that this was true; but the master of the rolls held that the partnership must be dissolved, and that the court

(*l*) *Jones v. Noy*, 2 M. & K. 125.

(*m*) 30 Bear. 302. In the same case it was held that the committees could not exercise an option which the lunatic had of buying the share of one of his copartners.

The right of pre-emption had accrued to the lunatic before his lunacy, and that event occurred before the time for exercising the option had expired.

could not appoint a manager to carry on the concern for the benefit of the lunatic's estate. The partnership property was ordered to be sold as a going concern, with liberty to all parties to bid, and a receiver and manager was appointed until the sale.

**Evidence of lunacy.**—In order to induce the court to order a dissolution on the ground of insanity of one of the partners, the court must be satisfied by clear evidence that the insanity exists and is incurable; (*n*)<sup>1</sup> a temporary illness is not sufficient; (*o*) and notwithstanding strong evidence as to the past, the court requires to be convinced that the insanity exists at the time its interference is called for, and it will therefore, if necessary, \*before making [\*579] an order, direct an inquiry whether the alleged lunatic is in such a state of mind as to be able to conduct the business of the firm in partnership with the other members according to the articles of partnership. (*p*) But no such inquiry is necessary where the partner is a lunatic and so found by inquisition. (*q*)

A lunatic partner not so found by inquisition is entitled to bring an action (by a next friend) for a dissolution, but it is doubtful whether the partnership can be completely wound up in the absence of a committee. (*r*)

**Date of dissolution.**—In ordering a dissolution of a partnership, not at will, on the ground of insanity, the court declares the partnership dissolved as from the date of the judgment and not from a prior day. (*s*) But if the articles of

(*n*) See *Kirby v. Carr*, 3 Y. & C. Ex. 184; *Anon.* 2 K. & J. 441.

<sup>1</sup>On the question of the mental competency of a party to make a division with his copartner and co-tenant of a large personal and real estate, the degree of injustice and inequality in the division will be taken into consideration with the proof in regard to incompetency. *Doughty v. Doughty*, 7 N. J. Eq. 227.

(*o*) See the last note, and *Whitwell v. Arthur*, 35 Beav. 140; *Huddleston's Case*, cited 2 Ves. Sen. 34, and *Sayer v. Bennet*, 1 Cox, 107.

(*p*) See *Anon.* 2 K. & J. 441; *Kirby v. Carr*, 3 Y. & C. Ex. 184, and *Sayer v. Bennet*, 1 Cox, 107, in which two last cases the partnership was a partnership at will.

(*q*) *Milne v. Bartlet*, 3 Jur. 358.

(*r*) *Jones v. Lloyd*, 18 Eq. 265.

(*s*) *Besch v. Frolich*, 1 Ph. 172. In

partnership authorize a dissolution and the partnership has been dissolved under the articles—which may be done, notwithstanding the insanity of one of the partners (*t*)—the dissolution must date from the time at which the partnership was so dissolved, and not from the date of the judgment. (*u*) Where a partnership is at will, and notice to dissolve has been given, the dissolution will be ordered as from the time fixed by the notice. (*x*) It was probably on the ground that a partnership at will is determinable on notice that in *Kirby v. Carr* (*y*) the dissolution was decreed from the filing of the bill, no previous notice having been given.

**Costs.**—When the court dissolves a partnership on the ground of insanity it directs the costs to be paid out of the partnership assets. (*z*)

**Lunacy regulation act.**—By the Lunacy Regulation Act (16 and 17 Vict. ch. 70, § 123) \*it is enacted

that, “where a person, being a member of a copartnership firm, becomes lunatic, the lord chancellor may, by order made on the application of the partner or partners of the lunatic, or of such other person or persons as the lord chancellor shall think entitled to require the same, dissolve the partnership; and thereupon, or upon a dissolution of the partnership by decree of the court of chancery, or otherwise by due course of law, the committee of the estate, in the name and on behalf of the lunatic, may join and concur with such other person or persons in disposing of the partnership property, as well real as personal, to such persons, upon such terms and in such manner, and may and

*Sander v. Sander*, 2 Coll. 276, and *Jones v. Welch*, 1 K. & J. 765, the dissolution was also from the date of the decree, but the reports do not show whether the partnerships were at will or not.

(*t*) *Robertson v. Lockie*, 15 Sim. 285. And see *Mellersh v. Keen*, 27 Beav. 236.

(*u*) See *Robertson v. Lockie*, 15 Sim. 285; *Bagshaw v. Parker*, 10 Beav. 532.

(*x*) *Mellersh v. Keen*, 27 Beav. 236.

(*y*) 3 Y. & C. Ex. 184. See, also, *Shepherd v. Allen*, 33 Beav. 577.

(*z*) *Jones v. Welch*, 1 K. & J. 765.

shall execute and do such conveyances and things for effectuating this present provision, and apply the moneys payable to the lunatic in respect of his share and interest in the copartnership in such manner as the lord chancellor shall order."

3. *As to misconduct and destruction of mutual confidence.*

**3. Misconduct.**—The court will dissolve a partnership on the ground that a partner so seriously misconducts himself as to render it impossible for his copartners to continue to act with him. (a)<sup>1</sup> But it is not considered to be the duty of the

(a) See *Smith v. Jeyes*, 4 Beav. 502; *Waters v. Taylor*, 2 V. & B. 299; *Charlton v. Poulter*, 19 Ves. 148, note.

<sup>1</sup>Misconduct on the part of one partner will not give the other partner a right to appropriate all the partnership property to his own use. *Krigbaum v. Vindquest*, 10 Neb. 435.

Where, by misrepresentation, one partner procures a sale to himself of partnership property by the other partner, such sale will be set aside and a dissolution and account decreed. *Caldwell v. Davis*, 15 Pac. Rep. (Colo.) 696.

Collection and misappropriation of partnership funds by one partner is ground for dissolution. *Flammer v. Green*, 47 N. Y. Super. Ct. 538.

Cases of gross misconduct, want of good faith, or criminal want of diligence, or such cause as is productive of serious and permanent injury to the partnership concerns, or renders it impracticable to carry on the business, is good ground for dissolution at the suit of the injured partner. *Howell v. Harvey*, 5 Ark. 270.

So, habitual drunkenness, great extravagance, or unwarrantable negligence in conducting the business of the partnership, justifies a dissolution; but it must be a strong and clear case of positive or meditated abuse to authorize such a decree. *Howell v. Harvey*, *supra*.

Where A. and B. entered into a contract to put up and sell ice, B. to perform the labor, and the contract contained the provision that if B. became dissipated and neglected the business A. might terminate the contract, and B. put up the ice and was disposing the same as agreed upon, when A. excluded him from the business on the ground that he had become dissipated, *held*, that unless B. both became dissipated and also neglected the business A. had no right to terminate the contract. *Krigbaum v. Vindquest*, 10 Neb. 435.

For minor misconduct and grievances, if they require redress, the court will interfere by injunction. *Howell v. Harvey*, *supra*.

Where the articles of partnership were that one partner was to furnish funds for keeping up the supplies, when in his power to do so,

court to enter into partnership squabbles, and it will not dissolve a partnership on the ground of the ill-temper or mis-

and the other partner to attend to selling the goods while he remained at home, it is clear that the parties never contemplated that slight neglect, or accidental failure of either to keep his engagements, should operate a dissolution, but only unequivocal demonstrations of gross acts of abuse or misconduct, where the injury would be imminent and irreparable. Under such an agreement, occasional absence from the state of one partner, where the other makes no objection, or detention from home by sickness in his family, does not warrant a dissolution; nor does the fact that the partner so absent was not, generally, a very profitable or attentive partner. *Howell v. Harvey, supra.*

Though bad character, drunkenness and dishonesty on the part of one partner may be good grounds for dissolving a partnership on the application of the other, this other not having known at the time of forming the partnership these characteristics of his copartner, yet, when before the partnership was formed they were known by the partner not guilty of them to have existed, they do not authorize such partner himself to treat the partnership as ended, and to take himself all the benefits of the joint labor and joint property. *Ambler v. Whipple, 20 Wall. 546.*

A want of courtesy to some customers of the firm, working no serious injury, is not a sufficient cause for a dissolution. *Gerard v. Gateau, 84 Ill. 121.*

Where the operations of a part-

nership in the business of supplying beef cattle to the government, under a contract with one of the firm, were suspended by an injunction issued on the filing of a bill by one member against another, but neither party treated the partnership as legally dissolved, *held*, that it existed until the filing of the decree of dissolution. *Abrahams v. Myers, 40 Md. 499.*

Though the costs of settling a partnership business are ordinarily charged upon the partnership property, they will be charged upon one partner alone, where his conduct merits punishment. *Taylor v. Cawthorne, 2 Dev. Eq. 221.*

A court of equity, in decreeing the dissolution of a partnership, may declare at what date the contract shall be at an end; but it may be questioned whether a mere violation of the articles of partnership by the defendant, not resulting in loss or injury, would make it proper for the court to fix the date of the dissolution at an earlier day than the abandonment of the partnership by the aggrieved party; and where the only effect of a modification of the chancellor's decree, so as to make the dissolution take effect as of an earlier day, would be to deprive the defendant of the right to the compensation stipulated in the articles, and that compensation is shown to be a reasonable allowance for the services actually rendered by him, the appellate court will not disturb the decree. *Dumont v. Ruepprecht, 38 Ala. 175.*

It is not necessary for the partner

conduct of one or more of the partners,<sup>1</sup> unless the others are in effect excluded from the concern, (b)<sup>2</sup> or unless the misconduct is of such a nature as utterly to destroy the mutual con-

seeking the dissolution to first obtain the decree of the court before dissolving the partnership, but he is permitted, when called on by a bill to account, to show in answer a violation of duty and the terms of the partnership by the other; and if satisfactorily established the firm is at an end from the time notice to that effect was given. *Von Tagen v. Roberts*, 2 Pearson (Pa.), 137.

Necessary findings in an action to dissolve a copartnership stated in *McCall v. Moschowitz*, 10 N. Y. Civ. Proc. 107.

As to the proper decree upon dissolution, see *Canada v. Barksdale*, 76 Va. 899.

As to the discretion of the court in fixing the date of dissolution of a partnership, see *Berry v. Folkes*, 60 Miss. 576.

<sup>1</sup> While a partnership or association will not ordinarily be dissolved for mere defects of temper in some of the members of the copartnership, the evidence of violent and lasting dissensions is a ground upon which a court of equity will decree a dissolution. In such a case a receiver will be appointed for an adjustment of the accounts of the copartnership or association, and a decree of dissolution will be made. *Lafond v. Deems*, 52 How. Pr. 41; *Abb. N. Cas.* 318.

A court of equity may dissolve a partnership when difficulties between copartners are of so serious a nature as to render the continuance of the company impractic-

able and injurious to one or both of its members. *Blake v. Dorgan*, 1 G. Greene, 537.

A mere error of judgment, especially if involving no permanent mischief, is no ground for a decree dissolving a partnership. *Cash v. Earnshaw*, 66 Ill. 402.

(b) See *Goodman v. Whitcomb*, 1 Jac. & W. 589; *Marshall v. Colman*, 2 id. 266; *Wray v. Hutchinson*, 2 M. & K. 235; *Roberts v. Eberhart, Kay*, 148.

<sup>2</sup> See *Berry v. Cross*, 3 Sandf. Ch. 1, the exclusion of a person elected trustee in an unincorporated company; *Werner v. Leisen*, 31 Wis. 169, the exclusion of a joint stockholder; *Hartman v. Woehr*, 18 N. J. Eq. 383.

Even where the partnership has been legally dissolved, and one partner continues to carry on the business, unlawfully using the property of the other in it, the retiring partner is at his option entitled to his share of the profits earned while his property is thus used. *Hartman v. Woehr*, *supra*.

Where one partner got possession of the entire proceeds of the year's operations without the consent of his copartner (there being nothing in the partnership agreement authorizing him so to do), and assumed the exclusive control of the whole business, *held*, that it was such a breach of faith as to authorize a decree for a dissolution of the partnership. *Kennedy v. Kennedy*, 3 Dana, 239.

Voluntary mutual relief associa-

fidence which must subsist between partners if they are to continue to carry on their business together. (c)<sup>1</sup> Where a dissolution is sought on this latter ground, it would [\*581] seem that the misconduct must be \*such as to affect the business, not merely by shaking its credit in the eyes of the world, but by rendering it impossible for the partners to conduct their business together according to the agreement into which they have entered. (d)<sup>2</sup>

tions are so far partnerships that a court of equity may dissolve them if they improperly exclude a member from voting. *Gorman v. Russell*, 14 Cal. 531.

Where a voluntary association, adjudged to be a partnership, and liable to dissolution for improperly excluding a member, thus excluded a member for refusing to take an oath not required by the constitution or by-laws, but afterwards, upon suit brought by him, removed the unauthorized restriction on the exercise of his rights as a member, *held*, that dissolution could not be decreed. *Gorman v. Russell*, 18 Cal. 688.

(c) See *Smith v. Jeyes*, 4 Beav. 502; *Harrison v. Tennant*, 21 Beav. 482; *Liardet v. Adams*, 1 Mont. Part. 112, note, where Lord Thurlow is reported to have said he did not see what degree of misconduct was to be held sufficient ground for dissolving a partnership.

<sup>1</sup> Where, upon a bill for dissolution, it appeared that the defendant was chargeable with misconduct in making a needless purchase of stock, by which the firm had been run heavily in debt, and in permitting a judgment to be recovered therefor without the knowledge of his partner; and also in colluding with others in a secret removal of assets of the firm for

some purpose inconsistent with good faith towards the complainant, and that the complainant had been led thereby to procure the arrest of defendant on a charge of larceny, *held*, that these circumstances warranted a dissolution on the ground that mutual confidence had been destroyed. *Seighortner v. Weisenborn*, 20 N. J. Eq. 172.

To a bill filed to revive a partnership, alleging that it was dissolved because a failure to obtain a government grant, the obtaining of which seemed probable, the defendant in his answer denied that this was the only reason, and gave other reasons for the dissolution. *Held*, that such denial was not irrelevant, and that the other reasons were likewise not irrelevant, unless they could be considered exceptionable as being scandalous; and an averment that the defendant "had become convinced that a business connection with the complainant was inexpedient and unsafe" could not be deemed scandalous; nor was it incompetent for the defendant to allege and prove that an offer by complainant to renew the partnership was merely colorable. *Griswold v. Hill*, 1 Paine, 390.

(d) See *Anon.* 2 K. & J. 441, where a partner had attempted suicide.

<sup>2</sup> Upon a bill in equity for a dis-



**Degree of misconduct.**—Most of the cases on this subject have come before the court on a motion for an injunction to restrain a partner from acting improperly, and have been alluded to when the remedy by injunction was considered. (*e*) It may, however, be usefully observed here that keeping erroneous accounts and not entering receipts, (*f*)<sup>1</sup> refusal to meet on matters of business, (*g*)<sup>2</sup> continued quarreling, and such a state of animosity as precludes all reasonable hope of reconciliation and friendly co-operation, (*h*) have been held sufficient to justify a dissolution. It is not necessary, in order to induce the court to interfere, to show personal rudeness on the part of one partner to the other, or even any gross misconduct as a partner. All that is necessary is to satisfy the court that it is impossible for the

solution and settlement of a partnership, such dissolution will be decreed, where it appears that the defendants refuse to carry out the terms of the partnership articles, and insist on changing or disregarding the stipulations thereof; that the state of feeling between the parties justifies the apprehension that the joint business can be no longer prosecuted to the mutual advantage of all the partners; and that a dissolution would not probably inflict any material injury on either party, although there may be no such acts of misconduct or wilful violation of the terms of the contract by the defendants as would authorize a dissolution for that cause. *Meaher v. Cox*, 1 Ala. Sel. Cas. 156; S. C. 37 Ala. 201.

Where a partnership is formed for the purpose of buying and selling lands, each partner to furnish an equal share of money, if one should refuse to make the necessary advances it would be good cause for putting an end to the

partnership; but as long as the partnership subsists a larger advance by one partner than it was his duty to make will be compensated by allowing him interest on such excess. *Turnipseed v. Goodwin*, 9 Ala. 372.

(*e*) *Ante*, p. 538 *et seq.*

(*f*) *Cheeseman v. Price*, 35 Beav. 142.

<sup>1</sup>A partner defrauded of his rightful portion of the partnership receipts by the false entries, etc., of his copartner is entitled to a dissolution and accounting, no matter if the term has not expired. *Cottle v. Leitch*, 35 Cal. 434.

(*g*) *De Berenger v. Hamel*, 7 Jar. Byth. 25, ed. 2.

<sup>2</sup>The absconding of a partner does not, *per se*, dissolve the partnership. *Arnold v. Brown*, 24 Pick. 89. *Contra*, *Whitman v. Leonard*, 3 id. 177, 179.

(*h*) *Baxter v. West*, 1 Dr. & Sm. 173; *Watney v. Wells*, 30 Beav. 56; *Pease v. Hewitt*, 31 Beav. 22; *Leary v. Shout*, 33 Beav. 582.

partners to place that confidence in each other which each has a right to expect, and that such impossibility has not been caused by the person seeking to take advantage of it. A strong illustration of this is afforded by *Harrison v. Tenant*. (i) In that case three persons, A., B. and C., entered into partnership as solicitors for twenty-one years. A. and B. had been in practice as partners before the partnership of A., B. and C. commenced, and were sued in chancery in respect of matters which had arisen in the course of such practice. In this suit A. was charged, after the formation of the firm A., B. and C., with gross misconduct and with fraud. B. and C. wished to have A.'s answer settled in consultation, but A. declined, made himself the sole solicitor on the record instead of the firm, and put in his answer without further consulting his copartners. B. and C.

filed a bill against A. for a dissolution, and sent [\*582] \*circulars to their clients stating that they had taken steps to dissolve the partnership existing between themselves and A., in consequence of the grave charges made against him in the suit above referred to. A. resisted the application for a dissolution on the ground that he had not been guilty of any misconduct towards his copartners in the business of the firm, nor of any breach of the articles of partnership. But a dissolution was decreed upon the broad principle that the mutual confidence reposed by all three partners in each other when the partnership was formed had not unreasonably ceased; that it was impossible that the business could be conducted as originally contemplated; and that although, being gentlemen, no outbreak had occurred between them, yet an attempt to compel them to act as partners for the future would, as against them all, be to compel them to inflict irreparable injury upon each other. Again, in *Essell v. Hayward*, (k) it was held that where one partner had become liable to a criminal prosecution by reason of his having been guilty of a fraudulent

(i) 21 Beav. 482.

(k) 30 Beav. 158.

breach of trust, his copartner had a right to have the partnership dissolved; and, a notice to dissolve having been given by him, the partnership was ordered to stand dissolved as from the date of the notice, although the partnership was not at will.

**Misconduct on part of partner seeking dissolution.—**

It must be borne in mind that the court will never permit a partner, by misconducting himself and rendering it impossible for his partners to act in harmony with him, to obtain a dissolution on the ground of the impossibility so created by himself. (*l*)<sup>1</sup>

In order to facilitate a dissolution in the event of misconduct, a special clause is usually inserted in partnership articles. The effect of clauses of this description has been already adverted to. (*m*)

When the court dissolves a partnership on the ground of \*misconduct the dissolution dates from [\*583] the judgment, unless there are special grounds for ordering a dissolution as from some other date. (*n*)

SECTION III.—TRANSFER OF INTEREST.

**Transfer of interest.**—In addition to the causes of dissolution already mentioned there are certain other events which, where the contrary is not expressly provided by agreement between the partners, immediately put an end to the partnership, or, at all events, confer a right to have it dissolved. Whether the partnership is of definite or indefinite duration is unimportant; (*o*) for the principle upon

(*l*) See *Harrison v. Tennant*, 21 Beav. 493, 494; *Fairthorne v. Weston*, 3 Ha. 387.

<sup>1</sup>*Gerard v. Gateau*, 84 Ill. 121.

(*m*) *Ante*, p. 426; *Anderson v. Anderson*, 25 Beav. 190, would seem at first sight to throw some doubt on the efficacy of such clauses, where the misconduct

complained of is not really of any importance. But the observations there made must be taken with reference to the facts before the court.

(*n*) *Lyon v. Tweddell*, 17 Ch. D. 529; *Besch v. Frolich*, 1 Ph. 172.

(*o*) *Crawford v. Hamilton*, 3 Mad. 251.

which a dissolution results from the events in question is that, if no dissolution were to follow, new partners would be introduced without the consent of all the existing members of the firm. (*p*) Any event which would produce this effect causes a dissolution *of the whole firm*. (*q*) Upon this principle it is that, in the absence of an express agreement to the contrary, a partnership is dissolved by taking a partner's share in execution under a *fi. fa.*, (*r*) by the transfer of his share by bankruptcy, (*s*) or outlawry, (*t*) and formerly, in the case of a female partner, by her marriage. (*u*)<sup>1</sup>

**Assignment of share.**—The question whether an assignment by a member of an ordinary firm of his share in it dissolves it, or gives the other members a right to have it dissolved, has not been much considered in this [\*584] country. (*x*)<sup>2</sup> Where the partnership is at will, \*an

(*p*) See *Crawshay v. Maule*, 1 Swanst. 509.

(*q*) *Collyer on Part.* 72.

(*r*) *Ante*, book iii, ch. 5, § 4.

(*s*) *Fox v. Hanbury*, 2 Cowp. 448; *Ex parte Williams*, 11 Ves. 5; *Ex parte Smith*, 5 Ves. 297.

(*t*) As to attainder and outlawry, see *ante*, p. 73. If a partner's share vests in the crown it is said that the crown by its prerogative becomes entitled to all the partnership property. *Collyer on Part.* 72, *sed quære*.

(*u*) *Nerot v. Burnand*, 4 Russ. 247; *aff'd*, 2 Bli. N. S. 215. See now the Married Women's Property Act, 1882.

<sup>1</sup> *Brown v. Chancellor*, 61 Tex. 437; *Bassett v. Shepardon*, 52 Mich. 3.

(*x*) In *Heath v. Sansom*, 4 B. & Ad. 175, the assignment was by one partner to his copartner; and in *Jefferys v. Smith*, 3 Russ. 158, the shares were transferable by the articles of partnership.

<sup>2</sup> An assignment by one partner of all his interest in the partnership property to a stranger necessarily operates a dissolution of the partnership. *Monroe v. Hamilton*, 60 Ala. 226; *Saloy v. Albrecht*, 17 La. Ann. 75; *McCall v. Moss*, 112 Ill. 493; *Carroll v. Evans*, 27 Tex. 262; *Miller v. Brigham*, 50 Cal. 615; *Barkley v. Tapp*, 87 Ind. 25; *Blaker v. Sands*, 29 Kan. 551; *Conrad v. Buck*, 21 W. Va. 396. See, also, *Moore v. Steele*, 67 Tex. 495.

In *Waller v. Davis*, 59 Ia. 103, it was held that a conveyance by one partner of his interest in the firm property to his copartner, while not *ipso facto* a dissolution, is evidence of a dissolution.

As to the effect of a conditional sale between partners as between the assignee in bankruptcy of one partner to the other partners, see *Crampton v. Jerkowski*, 2 Fed. Rep. 489.

Admission of a new partner *ipso facto* dissolves the old firm.

assignment and notice thereof must, it is conceived, operate as a dissolution. But where the partnership is for

*Peters v. McWilliams*, 78 Va. 567. See *post*, 231, note; *Hatchett v. Blanton*, 72 Ala. 423.

The formation of a corporation by the members of a firm for the purpose of carrying on the business is not necessarily a dissolution of the partnership for all purposes. *First National Bank v. Conway*, 67 Wis. 210.

An assignment of partnership property for the benefit of creditors which is void for want of conformity with statute requirements will not work a dissolution of the partnership. *Simmons v. Curtis*, 41 Me. 373.

Taking an account of stock and transferring the amount due to one partner to another firm of which he is a member does not of itself dissolve the partnership. *Russell v. Leland*, 12 Allen, 349.

Evidence that a partner sold to a stranger his interest in the stock of goods belonging to the firm, but not in the notes, accounts and other assets of the firm, and that the purchaser formed a partnership with the seller's partners, is not sufficient proof of the dissolution of the original partnership. *Cody v. Cody*, 31 Ga. 619.

It is held by a number of cases that an assignment by one partner of all his interest in the partnership is *ipso facto* a dissolution of the partnership, though the assignment is made to another partner. *Marquand v. New York Manuf. Co.* 17 Johns. 525; *Edens v. Williams*, 36 Ill. 552; *Horton's Appeal*, 13 Pa. St. 67; *Cochrane v. Perry*, 8 Watts & S. 262; *Rogers v. Nichols*,

20 Tex. 719; *Cochrane v. Albert*, 5 Watts & S. 333. See, however, *Taft v. Buffum*, 14 Pick. 322.

But when such assignment is made to his copartner it has been held that it does not have that effect unless its terms show that the parties contemplated and intended his entire withdrawal from the partnership and the termination of his duties, liabilities and authority as a partner between themselves. *Monroe v. Hamilton*, *supra*.

Where one of two or more partners undertakes by an incomplete and executory contract to transfer his interest in the firm to the others, such contract does not work a dissolution of the partnership until executed; and notice given to customers that such partnership is dissolved, based on the authority of such executory contract, will not release such withdrawing partner from his liability for debts of the firm contracted after the making of such contract and before notice of the actual dissolution. *Pennock v. White*, 10 N. Y. Weekly Dig. 74.

An assignment by one of two partners to the other of all his interest in the firm property, to be applied to the payment of the firm debts, does not dissolve the firm, and the property remains partnership property till the partnership debts are paid. *Matter of Shepard*, 3 Ben. 347.

A two years' lease at a stated rental by one partner to another of his interest in coal mines operated by the firm has been held either to dissolve the partnership absolutely,

a definite period, which is not expired, there is more difficulty in arriving at a correct conclusion. To hold that the assignment operates as a dissolution renders it competent

or with the assent of the members to suspend it during the continuance of the lease. *McAdams v. Hawes*, 9 Bush, 15.

A mortgage by one partner of all his interest in the firm property, or by the firm of all the property, does not *per se* work a dissolution of the firm. *State v. Quick*, 10 Iowa, 451.

Where two persons are cultivating a crop as equal partners, and one executes to the other a mortgage on his entire interest as security for an individual debt which the mortgagee has become liable to pay, and the mortgage contains a stipulation that, since the crop will be gathered before the maturity of the debt, the mortgagee shall take possession of it and dispose of it for the mutual benefit of the parties, and that the net profits, after settlement of the partnership dealings, shall be divided into two equal parts, one of which shall belong to the mortgagee absolutely and the other shall be held by him in trust for the mortgagor, to be applied to the payment of the secured debt, and the balance paid over to the mortgagor, such mortgage does not operate a dissolution of the partnership, nor affect the duties and liabilities of the mortgagor as a partner; nor does it limit his authority as a partner to contract debts in carrying on the business and to pay debts so contracted; it only confers on the mortgagee the right to the exclusive possession of the crop, and the exclusive power to dispose of it, and creates a lien on the mortgagor's interest in it as se-

curity for the mortgage debt. *Monroe v. Hamilton*, 60 Ala. 226.

By the conditions of an agreement a member transferred his interest in a firm as a collateral security for the payment of a debt, but the transfer contemplated a continuance of his interest and authority in the firm. *Held*, that the instrument was merely a mortgage and did not effect a dissolution of the partnership; that he could agree to a dissolution and to an appraisal and inventory to ascertain his final interest; that his copartners might take the stock at the value so ascertained, they being liable as trustees for the proceeds, and responsible for any fraud or unfairness in the arrangement, as in an ordinary sale for payment of debts. *Du Pont v. McLaran*, 61 Mo. 502.

The registration of a conveyance operates as constructive notice only when the statute authorizes its registration, and only to the extent of those provisions which are within the registration statutes. Hence the registration of a mortgage, by which one partner conveys to his copartner his entire interest in the partnership property as security for a debt, while it would operate as constructive notice against subsequent creditors and purchasers of the lien created on the mortgagor's interest in the property, would not have that effect so far as it imposed any restraint or limitation on the authority of the mortgagor as a partner. *Monroe v. Hamilton*, 60 Ala. 226.

for a partner to do indirectly what he cannot directly, viz., dissolve before the expiration of the time for which the partnership was entered into. On the other hand, to hold that the partnership continues is not just to the assignor's copartners. The assignment does not of itself create a partnership between them and the assignee; (*y*) but it does deprive the assignor of all his interest in the concern, and his copartners may fairly urge that they never contemplated a partnership with a person having no interest in it. It seems impossible, therefore, to deny their right to make the assignment a ground for dissolution. The right of the assignee, alone or with the assignor, to insist on a dissolution against the will of the assignor's copartners is much more doubtful, and has not been decided. In America such right is held to exist; (*z*) but in that country it seems that contracts of partnership for a definite period are almost as easily dissolved as partnerships at will, which is certainly not the case here. (*a*)

**Creation of trust of share.**—Whether an agreement by an ordinary partner to hold his share in the partnership in trust for other persons entitles his copartners to dissolve the partnership has never been determined. Considering, however, the effect of notice to them of the existence of the trust, they would probably be held entitled to have the partnership dissolved in order to be relieved from their embarrassment. The *cestui que trust* clearly does not become a partner with the partners of his trustee. (*b*)

(*y*) See *Jefferys v. Smith*, 3 Russ. 158.

(*z*) Story on Part. § 308; 3 Kent, Com. 59; *Marquand v. New York Manufac. Co.* 17 Johns. 525.

(*a*) In *Glyn v. Hood*, 1 Giff. 328, and 1 De G. F. & J. 334; *Pinkett v. Wright*, 2 Ha. 120; *Murray v. Pinkett*, 12 Cl. & Fin. 764, and *Jefferys v. Smith*, 3 Russ. 158, some obser-

vations on the rights of an assignee of a share will be found, but they do not touch the question alluded to in the text.

(*b*) See *Jefferys v. Smith*, 3 Russ. 158; *Newry Rail. Co. v. Moss*, 14 Beav. 64; *Bugg's Case*, 2 Dr. & Sm. 452. *Goddard v. Hodges*, 1 Cr. & M. 33, is the other way; but as to this, see *ante*, p. 28, note (*p*).

[\*585] \*SECTION IV.—THE OCCURRENCE OF SOME EVENT WHICH RENDERS THE CONTINUANCE OF THE PARTNERSHIP ILLEGAL.

**Illegality — War.**—Upon principle it is apprehended that if, by any change in the law, it becomes illegal to carry on a business, every partnership formed before the making the law, for the purpose of carrying on that business, must be taken to have been dissolved by the law in question. So if, the law remaining unchanged, some event happens which renders it illegal for the members of a firm to continue to carry on their business in partnership, such event dissolves the firm. For example, if a partnership exists between two persons residing and carrying on trade in different countries, and war between those countries is proclaimed, a stop is thereby put to further intercourse between the partners, and the partnership subsisting between them is consequently dissolved. (c)<sup>1</sup>

(c) Story on Part. § 315 *et seq.*, and *Grimwold v. Waddington*, 16 Johns. 438 (Amer.), there cited. See, also, *ante*, pp. 72, 92.

<sup>1</sup> A partnership between persons residing in two different countries, for commercial purposes, is suspended, if not *ipso facto* determined, by the breaking out of war between those countries. *Griswold v. Waddington*, 15 Johns. 57; 16 id. 438; *Seaman v. Waddington*, id. 510. See *post*.

Belligerent relations between partners during the late civil war not only operated to dissolve or suspend partnerships then existing, but made unlawful the formation of new partnerships while such relations existed. *McAdams v. Hawes*, 9 Bush, 15.

The war of the rebellion dissolved

a copartnership existing between infants in Illinois and a person in Mississippi, but the dissolution had no regard to things past. The parties continued partners as to property actually acquired, and remained bound to account to each other therefor. *Douglas' Case*, 14 Ct. Cl. Rep. 1.

Where partners domiciled on loyal and disloyal territory were engaged in growing cotton before the war, it was not contrary to the principle of international law forbidding commercial intercourse for the resident partner to turn over to a common agent on the spot, appointed prior to hostilities, a mass of cotton, as the share of the absent partner. *Douglas' Case*, *supra*.

A payment in discharge of an



actual indebtedness, made by one partner to his partners, absent on hostile territory, after the dissolution of the concern by war, whether effected by the delivery of a sum of money or of goods, will be upheld if made by an agent on the spot, whose agency was created before the war begun. If the money or goods thus delivered were inadequate to discharge the just claims of the absent partners, it rests with them alone to complain. Douglas' Case, *supra*. Though the war worked a dissolution of the partnership, nevertheless, after the war, the surviving partners might maintain an action in their own names for the proceeds of captured property of which the firm were owners. Douglas' Case, *supra*.

## CONSEQUENCES OF DISSOLUTION.

**Winding up of partnerships.**—In order to wind up the affairs of a dissolved partnership it is necessary first to pay its debts; secondly, to settle all questions of account between the partners; and thirdly, to divide the unexhausted assets (if any) between the partners in proper proportions; or, if the assets are insufficient for these purposes, then to make up the deficiency by a proper contribution between the partners. This can be done by the partners themselves or their representatives; (*d*) but if disputes arise, then recourse must almost always be had to the chancery division of the high court, for it is under its superintendence only that the assets of a partnership can be properly sold and applied, that the partnership accounts can be satisfactorily taken, and that contribution can be enforced. (*e*)

**Consequences of dissolution.**—The consequences of a dissolution of partnership, both as regards creditors and as regards the partners themselves, have been pointed out in earlier parts of the treatise and only require to be shortly recapitulated.

**I. As regards the creditors of the firm** it has been seen —

1. That a dissolution of partnership, whether general or partial, does not discharge any of the partners from liabilities incurred by them previously to the time of dissolution. (*f*)

2. That in order that a member of a firm, wholly or par-

(*d*) See *Lyon v. Haynes*, 5 Man. & Gr. 505, where a banking company, governed by 7 Geo. 4, ch. 46, had been voluntarily dissolved.

(*e*) See book iii, ch. 10, § 6.

(*f*) *Ante*, p. 223 *et seq.*

tially dissolved, may be freed from his liability to a person who was a creditor of the firm at the time of its dissolution, such creditor must either have been paid or satisfied, or must have accepted some fresh obligation in lieu of that which existed when the firm was dissolved. (*g*)

\*3. That (except in a few special cases) (*h*) notice [\*587] of dissolution or retirement is requisite to determine the responsibility of each partner in respect of such future acts of his late copartners as would be imputable to the firm if no change in it had taken place. (*i*)

4. That notice of dissolution generally, as by advertisement, is not sufficient to affect an old customer, unless it can be brought to his knowledge. (*k*)

5. That notice of dissolution is notice that the former partners are no longer each other's agents as before. (*l*)

6. That, after dissolution and notice, partners cease to be responsible for the future acts of each other, (*m*) unless they continue to hold themselves out as partners, in which case the notice is of no avail. (*n*)

**II. As regards the partners themselves.**— Upon the dissolution of a partnership, and in the absence of any agreement to the contrary, it has been seen:

1. That each partner has a right to have the partnership assets applied in liquidation of the partnership debts, and to have the surplus assets divided. (*o*)

2. That the right of each partner is to insist on a sale of the partnership assets; there being, in the absence of special circumstances, no right in any partner to have the value of his own or of any copartner's share determined by valuation, or to have the partnership property, or any portion of it, divided in specie. (*p*)

3. That each partner has a right to insist that nothing

(*g*) *Ibid.*

(*h*) *Ante*, p. 210 *et seq.*

(*i*) *Ibid.*

(*k*) *Ante*, p. 221.

(*l*) *Ante*, pp. 210, 213.

(*m*) *Ibid.*

(*n*) *Ante*, d. 216.

(*o*) *Ex parte* Ruffin, 6 Ves. 127.

(*p*) *Ante*, p. 555.

further shall be done, save with a view to wind up the concern. (*q*)

4. That, for the purposes of winding up, the partnership is deemed to continue; (*r*) the good faith and honorable conduct due from every partner to his copartners during the continuance of the partnership being equally [\*588] due so long as its affairs \*remain unsettled; (*s*) and that which was partnership property before, continuing to be so for the purpose of dissolution, as the rights of the partners require. (*t*)

5. That the right on a dissolution to wind up the partnership affairs, *i. e.*, to get in its credits, convert its assets into money, pay its debts, and divide the residue, belongs as much to one of the late partners as to another; and, if they cannot agree among themselves, recourse must be had to the court, which will, if necessary, appoint a receiver, direct a sale of the assets and payment of the partnership debts, and restrain a partner from interfering with the proper winding up of the partnership. (*u*)

6. That the right to wind up the affairs of a dissolved partnership is, however, personal to the members of the late firm;<sup>1</sup> and that, therefore, on the death or bankruptcy of one of them, his executors or trustees will not be permitted to take the management of the affairs of the partnership out of the hands of the other partners. (*x*)

(*q*) *Wilson v. Greenwood*, 1 Swanst. 481; *Crawshay v. Maule*, id. 507; *Ex parte Williams*, 11 Ves. 3.

(*r*) See *ante*, p. 217.

(*s*) *Ante*, p. 303.

(*t*) See *Ex parte Williams*, 11 Ves. 5 and 6; *Crawshay v. Collins*, 2 Russ. 342, 344; *Nerot v. Burnand*, 4 Russ. 247; *Payne v. Hornby*, 25 Beav. 280. See, too, *Ex parte Trueman*, 1 D. & Ch. 464, as to partnership books.

(*u*) See *ante*, book iii, ch. 10, § 6.

<sup>1</sup> A creditor of an individual partner is not entitled to wind up the firm to subject his interest upon the same without first fixing a lien by process. *Lincoln Savings Bank v. Gray*, 12 Lea (Tenn.), 459.

As to when a bill of interpleader will lie by a committee carrying on the business for creditors of an insolvent firm, as against the committee and the assignees in insolvency of the firm, see *Fairbanks v. Belknap*, 135 Mass. 179.

(*x*) *Allen v. Kilbre*, 4 Madd. 464;

7. That, if the partnership assets are insufficient to pay the partnership debts, the deficiency must be made good by the partners in proportion to their respective shares. (*y*)

8. That, after a partnership has been dissolved, any one of the late partners has a right to have that dissolution duly notified, so that a stop may be put to the power of his copartners to bind him. (*z*) It seems that he has also a right to restrain them from carrying on business under the old name, if such name is or includes his own, and if he has not assigned his interest in the good-will to them; for although their continued use of the old name, even with his knowledge, is not of itself sufficient to render him liable, by virtue of the doctrine of holding out, (*a*) such use undoubtedly exposes him to the \*risk of having ac- [\*589] tions brought against him as if he still belonged to the firm, and, in the case supposed, his copartners have no right to expose him to that risk. (*b*)

9. That each partner has a right to commence a new business in the old line, and in the old neighborhood, either alone or in partnership with other people. (*c*)

**Matters involved in the winding up of a partnership.**—Such, in general terms, are the consequences of dissolution. In order, however, to obtain a complete view of these consequences, it is necessary to attend to the principles upon which premiums are apportioned and partnership accounts are taken; to the distinction between the joint estate of the firm and the separate estates of the partners composing it; to the doctrines of contribution and indemnity; to the rules which relate to appointing a receiver and granting an injunction; and, lastly, to the special agreements, if any, into which the partners may have entered. All these mat-

*Ex parte* Finch, 1 D. & Ch. 274; (a) *Newsome v. Coles*, 2 Camp. Fraser v. Kershaw, 2 K. & J. 496. 617.

(y) See *ante*, p. 401.

(b) See *ante*, p. 544.

(z) *Hendry v. Turner*, 32 Ch. D. (c) See, as to this, *ante*, pp. 436, 355; *Troughton v. Hunter*, 18 Beav. 437. 470.

ters were discussed in the third book, and it is not necessary further to allude to them. But the complicated questions which arise in the event of a dissolution by death or bankruptcy have necessarily been reserved for separate examination, and they will form the subject of the next two chapters of the present book.

OF DEATH AND ITS CONSEQUENCES.

The consequences of the death of a member of a partnership will be most conveniently pointed out in the course of an examination of the position of the surviving members and of the executors of the deceased member —

1. As between themselves;
2. As regards the creditors of the firm; and
3. As regards the separate creditors and legatees of the deceased.

SECTION I.—CONSEQUENCES AS REGARDS THE SURVIVING PARTNERS AND THE EXECUTORS OF THE DECEASED.

**Death of a partner dissolves the firm.**—The death of any one member of a firm operates as a dissolution thereof as between all the members, unless there is some agreement to the contrary. (a)<sup>1</sup> This is obviously reasonable; for, by the

(a) See *Pearce v. Chamberlain*, 2 Ves. Sen. 33; *Crawford v. Hamilton*, 4 Madd. 271; *Crawshay v. Maule*, 1 Swanst. 509; *Vulliamy v. Noble*, 3 Mer. 614; *Crosbie v. Guion*, 23 Beav. 518. *Burwell v. Mandeville*, 2 How. 560; *Marlett v. Jackman*, 3 Allen, 287; *Scholefield v. Eichelberger*, 7 Pet. 586; *Knapp v. McBride*, 7 Ala. 19; *Goodburn v. Stevens*, 5 Gill, 1; *Williamson v. Wilson*, 1 Bland,

418; *Gratz v. Bayard*, 11 Serg. & R. 41; *Davis v. Christian*, 15 Gratt. 11; *Roberts v. Kelsey*, 38 Mich. 602; *Jenness v. Carleton*, 40 Mich. 343; *Remick v. Ewing*, 42 Ill. 342; *Forrester v. Oliver*, 1 Bradwell, 259; *First Nat. B'k v. Farmers' Nat. B'k*, 5 Cent. Rep. 505; *Weise v. Moore*, 5 West. Rep. 58; *Smith's Estate*, 11 Phila. 131; *S. C. 33 Leg. Intel.* 149; *Spannhorst v. Link*, 46 Mo. 197; *McCall v. Moss*, 112 Ill. 493; *Cowan*

death of one of the members, it is no longer possible to adhere to the original contract, the essence of which is (in the

*v. Gill*, 11 Lea, 674; *Starr v. Cosgrave Brewing Co.* 12 Can. Supr. Ct. 571; S. C. 6 Can. L. T. 249; S. C. 5 Ont. 189; 12 Can. Supr. Ct. 571; *Frank v. Beswick*, 44 U. C. (Q. B.) 1; *Hoard v. Clum*, 31 Minn. 186. See *ante*. See, also, *Carroll v. Alston*, 1 S. C. 7; *Farmers'*, etc. *Sav'g Inst'n v. Garesché*, 12 Mo. App. 584.

A simple provision in the articles for the continuance of the partnership for a fixed period will not prevent its dissolution by the prior death of one of the firm. *Hoard v. Clum*, 31 Minn. 186.

Death of one partner not only terminates the partnership, but also all unexecuted portions of the partnership agreement. *Oliver v. Forrester*, 96 Ill. 315.

Partners continuing the business after a member's death cannot bind his interest by notes in firm name for a debt due before he died to partnership creditors who have notice of the dissolution. *Citizens' Mutual Insurance Co. v. Lignon*, 59 Miss. 305.

But where the business of a firm was continued after the death of one of its members precisely as before, representatives of the deceased member taking the benefit of his interest, the firm is not regarded as dissolved by his death. *Butler v. American Toy Co.* 46 Conn. 136.

The death of a member of a firm will not, in the absence of a stipulation to that effect, release the survivors from the obligation to perform the contracts of the firm, except where the personal service

or peculiar skill of the deceased partner is required for their performance. *Ayres v. Railroad Co.* 52 Ia. 478; *Davis v. Sowell*, 77 Ala. 262.

A contract to serve a copartnership during a given period is dissolved by the death of one partner and the substitution of another during the term. *Redheffer v. Leathe*, 15 Mo. App. 12; *Burnett v. Hope*, 9 Ont. 10; S. C. 21 Can. L. J. (N. S.) 138; 5 Can. L. T. 135.

A continuing guaranty of a third person to a certain amount to a firm will be terminated by the death of one of the partners and the consequent change of the firm. *Cosgrove Brewing Co. v. Starrs*, 5 Ont. 189; 6 Can. L. T. 249; S. C. 12 Can. Supr. Ct. 571; 6 Can. L. T. 249; reversing 11 App. R. 156.

As to whether the surviving partner of a firm of lawyers must devote his skill and labor, through a possible period of years, in conducting and closing up litigation commenced by the firm for the benefit equally of the estate of his deceased partner and himself, *quære*. *Sterne v. Goep*, 20 Hun (N. Y.), 396.

If a surviving partner is required to execute contracts entered into by the firm before the death of a member, it is only so as to contracts entered into with persons not members of the firm and not in respect to contracts made between the several members of the firm as to the mode of conducting the partnership business. *Oliver v. Forrester*, 96 Ill. 315.

A power previously given to such



case supposed) that all the parties to it shall be alive. The mere fact that the partnership was entered into for a defi-

firm would terminate on the happening of either event. See the cases above cited. *Ewell's Evans* on Agency, \*32 and note.

Authority to a firm to receive goods is not extended to a new firm formed after dissolution of the original one from a part of the members thereof. *Angle v. Mississippi, etc. R. R. Co.* 9 Iowa, 487.

So the death of a special partner dissolves the partnership. *Ames v. Downing*, 1 Bradf. 321; *Jacquin v. Buisson*, 11 How. Pr. 385.

After the death of J., one of three equal partners in the business of a flouring mill, his two survivors, without either the assent or dissent of his administrator, erected a granary, which a successful continuation of the business required, and carried on the business nearly a year under an arrangement with the administrator, without rendering an account. On a bill by the administrator for a discovery and account, *held*, that the partnership being dissolved by J.'s death, his survivors had no lawful right thereafter to expend any of its funds in the conduct of the business, however necessary. *Remick v. Emig*, 42 Ill. 342.

A lease for a term of years, made by one of two partners to the firm for the purposes of the business, is subject to the continuance of the business, and upon a dissolution by the death of either partner the lease terminates. *Johnson v. Harts-horne*, 52 N. Y. 173.

A surviving partner cannot be held responsible on a contract made without his assent or knowl-

edge by another partner after the firm has been dissolved by the death of one of its members, although no notice of its dissolution has been given to the person with whom the contract was made. *Marlett v. Jackman*, 3 Allen, 287.

Where, after the death of one member of a firm, the holder of a note of the firm, without knowledge of the death, received a new note signed in the firm name in renewal of such note, and delivered up the same, *held*, that the new note, having been taken through a mistake of fact, was not a payment of the old note. Also, *held*, that the bringing of an action upon the last note against the surviving partner, and recovery of judgment thereon, in the absence of proof of knowledge on the part of plaintiff at the time of bringing the action that the deceased partner died before the giving of the note, was not a ratification of the transaction as a release of the estate of the deceased. *First Nat. Bank v. Morgan*, 73 N. Y. 593.

But a partner may, by his will, provide that the partnership shall continue notwithstanding his death, and if it be assented to by the surviving partner it becomes obligatory. *Burwell v. Mandeville*, 2 How. 560.

Although by the general rule of law every partnership is dissolved by the death of one partner, yet partners may by agreement provide for the continuance of the partnership after the death of one of the partners; and in this agreement each partner may bind his

nite term of years, which was unexpired when the death occurred, is not sufficient to prevent a dissolution by such death. (*b*)

whole estate for debts incurred by the continued partnership after his death, or he may bind only that portion of the property which may be embarked in the partnership at the time of his death. *Cook v. Rogers*, 8 Am. Law Record, 641.

The death of a partner will not dissolve the partnership when the partnership contract shows that the intention of the parties was to have it continue; as, for example, when it takes the form of a joint-stock association, with transferable shares, officers, records, and a general agent to transact the business. *McNeish v. Hulless Oat Co.* 57 Vt. 316.

Under a special contract to that effect, a commercial partnership will continue after the death of one of the partners for the purpose of administration and liquidation, if not for all purposes. *Powell v. Hopson*, 13 La. Ann. 626. See, also, *Walker v. Wait*, 50 Vt. 668.

Where the articles provided that the partnership should continue for so long a time as the partners shall severally and mutually agree thereto, and that in case of death shall not necessarily be dissolved, but the said partnership may be continued by the survivors jointly with the executrix of the deceased partner or the assignee, *held*, that, while the partnership might be continued after such dissolution by voluntary agreement of the parties, either party might have the partnership dissolved if they so

elected, and that the survivors, having elected to dissolve the partnership, were not bound thereafter to account for profits. *Wilson v. Simpson*, 89 N. Y. 619.

A court of equity may authorize the continuance of a partnership, after the death of a partner, on behalf of infants. *Powell v. North*, 3 Ind. 392.

Several persons who were tenants in common of certain quarry lands formed a copartnership in 1850 to carry on the quarrying business, the several partners putting in their interests in the quarry lands, and having a corresponding interest in the copartnership. One of the interests thus put in was owned by M., a widow, for life, and subject to her life estate, by P., her daughter, and the interest in the copartnership was owned by them in the same manner. By the partnership agreement the copartnership was to continue so long as a majority in interest should desire. The business was continued, by assent of all parties, through several changes by death and succession, until 1872, when M. died, giving by will all her interest, which was mainly her share of the undivided profits, to her grandchildren, who, with her administrator, were the petitioners. These profits had been very large, but, instead of being divided, had been invested in other quarry lands, which had been in part worked. After 1872 the business was still carried on as before,

(*b*) *Crawford v. Hamilton*, 3 Madd. 251.

**Executors of deceased do not become partners.**—Unless all the partners have agreed to the contrary, when one of them dies his executors have no right to become part-

under the management of B., who had been the principal manager from the first. In 1874 the petitioners, having previously demanded of B. an account and payment of the money due them from the copartnership, brought a bill in equity praying that all the property bought with the profits of the business previous to the death of M. might be sold and their share of the money paid over to them; that an account be taken of all the copartnership dealings, and that a receiver be appointed. The petition averred that the petitioners, by reason of the deaths of members of the copartnership, and the confusion of interests, were unable to say whether the copartnership was dissolved, but that they believed, and therefore averred, that it was dissolved. B., as manager of the business, had incurred large personal obligations, and a large amount of property taken by him for debts due the copartnership had greatly depreciated. *Held*, 1. That the copartnership was to be regarded as continuing by consent of the parties succeeding to the interests of the members who had died, and is still existing. 2. That the allegation that the petitioners were unable to say whether there had been a dissolution or not, but that they believed, and therefore averred, that the copartnership was dissolved, was not an averment that the copartnership had been dissolved by a withdrawal of the assent under which it had been continued, and a demand for its

dissolution. 3. That the demand by the petitioners of an account from B., and of payment of their share of the profits, did not constitute a demand for a dissolution. 4. That the petitioners were not entitled to demand, in cash, the value of their interest, inasmuch as they had consented to let the business go on under the management of B., and, having taken their chance for profits from the use of their share by the copartnership, they were to share the risks of loss from the continuance of the business. 5. That the petitioners could effect a dissolution of the copartnership by giving distinct notice to B. that they should not longer consent to its continuance, and should hold him responsible, as a surviving partner, for the further use of their share of the copartnership property. *Duffield v. Brainard*, 45 Conn. 424.

Where, after the death of a partner, one of his survivors has taken no part with the rest in carrying on the partnership business, he is not bound by any implication that they constitute a new firm. *Matteson v. Nathanson*, 38 Mich. 377.

It is well established that, in mining partnerships, there is usually no *delectus personarum*, and, as a consequence, that such a partnership is not dissolved by the death of a partner, or a sale of an interest by a partner to a stranger. *Taylor v. Castle*, 42 Cal. 367.

Whether a member's death operates as a dissolution of a partnership or unincorporated joint-stock company depends on the terms and

[\*591] \*ners with the surviving partners; (c) nor to interfere with the partnership business; but the executors of the deceased represent him for all purposes of account,<sup>1</sup> and, unless restrained by special agreement, they have the power, by bringing an action, to have the affairs of the partnership wound up in a manner which is generally ruinous to the other partners.<sup>2</sup>

**Jus accrescendi, etc.**—The maxim *jus accrescendi inter mercatores locum non habet* has been already examined and need not be again noticed. (d)

**Position of surviving partners.**—On the death of a partner the surviving members of the firm are the proper persons to get in and pay its debts. (e)<sup>3</sup> But the debts they

effect of the contract of formation and the character of the organization. *Walker v. Wait*, 50 Vt. 668.

(c) *Pearce v. Chamberlain*, 2 Ves. Sr. 33.

<sup>1</sup> For the purpose of taking out probate and paying the fees thereon, under R. S. O. ch. 46, the representative of a deceased partner in a mercantile firm must be taken to be interested in the *corpus* of the partnership effects to the extent of the share of the deceased, undiminished by the debts and liabilities of the firm. *In re Surrogate Court of Wentworth*, 44 U. C. Q. B. 207.

The current profits of a partnership are personal property and descend as such under the intestate laws whether the property of the firm be real or personal. *Leaf's Appeal*, 105 Pa. St. 505; S. C. 14 Weekly Not. Cas. 507; 41 Leg. Intel. 450.

<sup>2</sup> A will provided that the balance of capital due the testator in a firm of which he was member might remain with the surviving

partners for a certain time at interest. *Held*, that the executors were barred during that time from recovering the same, and that security could not be required by the court in a suit to which one of the surviving partners was not a party. *Vernon v. Vernon*, 7 Lans. 493.

(d) *Ante*, p. 340.

(e) *Ante*, p. 288.

<sup>3</sup> On a dissolution of a copartnership by the death of one of the partners the survivor has a right and it is his duty to take possession of the copartnership assets, and settle up the affairs of the joint concern in the manner most conducive to the interests of all persons interested, and to distribute the surplus, if any. *Marlatt v. Scantland*, 19 Ark. 443; *Allen v. Hill*, 16 Cal. 113; *Tillotson v. Tillotson*, 34 Conn. 335; *Florida Territory v. Redding*, 1 Fla. 242; *Miller v. Jones*, 39 Ill. 54; *Murray v. Mumford*, 6 Cow. 441; *Walker v. House*, 4 Md. Ch. 39; *Dwinal v. Stone*, 30 Me. 384; *Barry v. Briggs*, 22 Mich. 201; *Teigley v. Whitaker*, 22 Ohio St. 606; *Price v. Hicks*, 14

get in must be placed to the debit of the late firm, and the debts they pay must be placed to its credit. Whilst, there-

Fla. 565; *Weise v. Moore*, 5 West. Rep. 58; *Davidson v. Papps*, 28 Grant, Ch. 91; *State v. Brown*, 93 N. C. 344; *Calvert v. Miller*, 94 N. C. 600; *Farley v. Moeg*, 79 Ala. 148; *Anderson v. Ackerman*, 88 Ind. 481; *Blaker v. Sands*, 29 Kan. 551; *Barlow v. Coggan*, 1 Wash. Ter. 257; *Davis v. Sowell*, 77 Ala. 262; *Smith's Estate*, 11 Phila. 131; S. C. 33 Leg. Int. 149; *Franklin v. Tonjourns*, 1 Tex. App. (Civ.) 250; *Kenton Furnace Co. v. McAlpin*, 5 Fed. Rep. 737; *Oliver v. Forrester*, 96 Ill. 313; *Starr v. Case*, 59 Ia. 491; *McKay v. Joy*, 11 Pac. Rep. 832; S. C. 9 Pac. Rep. 940; *Witbeck v. Chittenden*, 50 Mich. 426; *Loomis v. Armstrong*, 49 Mich. 521; *Aiken v. Jefferson*, 65 Tex. 137; *Hoard v. Clum*, 31 Minn. 186.

Where there are two surviving partners this right and duty devolve equally on both, and a delivery or payment to either is a discharge from all liability or obligation to the other. *Davis v. Sowell*, 77 Ala. 262.

It is the duty of surviving partners to settle up the firm business without delay; and it is also the duty of the administrator of the deceased partner to see that they do so. If a surviving partner fails to use proper diligence in closing up the partnership affairs and does not settle within a reasonable time, he may be compelled to do so by a court of competent jurisdiction or may be removed from his trust and a receiver appointed. *McKean v. Vick*, 108 Ill. 373. See, also, *Davis v. Sowell*, 77 Ala. 262.

A surviving partner, bound by

the articles to liquidate the concern within six months after dissolution of the firm by death, and who has no right after that period to prolong the liquidation, is liable for the value of all the assets at the termination of the delay when they cannot be returned in *integrum*. *Klotz v. Macready*, 2 So. Rep. (La.) 203.

As to the form of the decree in favor of receiver against the surviving partner, for the turning over to the receiver of the firm assets, etc., see *Geery v. Geery*, 79 N. Y. 565.

He is not, as a general rule, liable to an action by the personal representative of the deceased partner until after demand and refusal of a settlement. *Anderson v. Ackerman*, 88 Ind. 481.

It is sufficient that the surviving partners, in settling the affairs of the firm, act in good faith and with reasonable diligence; and the fact that money came into their hands to the credit of persons who were owing the firm did not make it obligatory on them to retain out of such money enough to satisfy the debts due the firm, though they might have done so. *Starr v. Case*, 59 Ia. 491.

Where a mercantile firm was dissolved by the death of one partner, the landlord having a lien on their stock of goods for the rent accruing under the firm lease, the surviving partner has a right to close out the business for the best interest of all concerned; and the landlord is not entitled in such case to an injunction to compel surviving

fore, the executors of the deceased partner are entitled to treat payments made to the survivors by a debtor to the

partner to hold the goods until the expiration of the term or to sell them only in the ordinary course of trade, especially where such survivor is himself a man of ample means. *Milner v. Cooper*, 65 Ia. 190.

An instruction that it was the duty of a surviving partner to convert its property into money, collect its debts and first apply them to the payment of its debts, and that if he mingle the goods of the firm with his own so that they could not be identified he rendered his own liable for firm debts, and the application of the proceeds of the goods to his own individual debt was a fraud upon the firm creditors, *held* to be erroneous. *McGinty v. Flanagan*, 106 U. S. 661.

A representative of a deceased partner in a firm of hotel-keepers cannot, after the expiration of their lease of the hotel, restrain the survivor from separating the furniture which belonged to the firm from the rest of the hotel property, on the ground that its value depended on its being used in connection with the good-will of the property, and that such separation would cause irreparable injury to the interest of the decedent's estate in the partnership assets. *Witbeck v. Chittenden*, 50 Mich. 426.

A surviving partner, having the legal right to the possession of partnership property, the court will not deprive him of that right unless upon proof of mismanagement or danger to the partnership

effects. *Connor v. Allen*, Harr. Ch. 371; *Farley v. Moag*, *supra*.

After payment of partnership debts he may retain the firm assets till the indebtedness of the firm to him is paid, if no proceedings are taken against him for a settlement; in such case, if the statute of limitations runs against anybody it is against the representatives of the deceased party. *Clay v. Freeman*, 118 U. S. 97.

A sole surviving partner has the entire legal title to all the partnership assets. (See *ante*.) He has a right, acting honestly and with reasonable discretion and diligence, to dispose of them as he pleases, to settle all debts against the concern, to make any compromise he may deem necessary, and to turn the assets into an available and distributable form. *Barry v. Briggs*, 22 Mich. 201.

A surviving partner is entitled to the exclusive possession and control of all the partnership assets, including choses in action, and may assign the latter in the legitimate settlement of the partnership business, notwithstanding such partnership and its individual members may be insolvent. *Willson v. Nicholson*, 61 Ind. 241. See, also, *Roys v. Vilas*, 18 Wis. 169; *Pinckney v. Wallace*, 1 Abb. Pr. 82.

See, however, *Hill v. Treat*, 67 Me. 501; *Cook v. Lewis*, 36 id. 340; *Cavitt v. James*, 39 Tex. 189; *Mutual*, etc. *Institution v. Euslin*, 37 Mo. 453.

The foreign executor of the deceased partner may join with the survivor in executing a power of

old firm as made in respect of his debt to it, (*f*) the survivors have a right, if they pay more than their share of

attorney authorizing a third person to act as financial agent of the firm. *Farmers & Traders' Savings Institution v. Garesche*, 12 Mo. App. 584.

In an action by the assignee on a chose in action of an insolvent partnership, which has been assigned by a surviving partner, it is presumed, where the contrary does not appear, that such assignment was made in the *bona fide* settlement of the partnership business; and where in such action creditors of the insolvent partnership apply to be made parties to the action and file a counter-claim asking application of the proceeds of such chose in action to the payment of their debts, and the counter-claim does not allege that such assignment was made in bad faith, in which the assignee participated, it is insufficient and may be struck out on motion. *Willson v. Nicholson*, 61 Ind. 242.

The sole survivor of a firm may assign a promissory note, payable to the late firm, by indorsement, so as to vest the legal title in the assignee as effectually as if the note had been made payable to him. *Johnson v. Berlzheimer*, 84 Ill. 54. See *Cavitt v. James*, 39 Tex. 189.

A surviving partner has the right to apply partnership funds to release real estate of the firm from incumbrance, and to fulfill contracts for the purchase of real estate. *Shearer v. Shearer*, 98 Mass. 107.

A surviving partner cannot lawfully purchase the property of the firm at his own sale, nor can he become a purchaser of such property from a co-trustee; but he may lawfully purchase a share of the partnership property belonging to the estate of the deceased partner from his personal representative. *Kimball v. Lincoln*, 99 Ill. 578; *S. C. 5 Bradw.* 470.

A surviving partner has no authority to set off any definite portion of firm assets to the representative of the deceased partner and retain some other definite portion for himself, unless by some act to which the representative becomes a consenting party; neither can he in fairness exclude the latter from participation in the assets so far as the latter has occasion to use them. *Chittenden v. Witbeck*, 50 Mich. 401.

It is the duty of a surviving partner to apply the assets to payment of the firm debts. *Gwynne v. Estes*, 14 Lea (Tenn.), 662.

The surviving partner in a proper case may be enjoined from disposing of the firm assets pending a settlement of accounts. *Fletcher v. Van Dusen*, 52 Ia. 448.

Assets of a partner in the hands of the surviving partner at his death are, however, so far his personal property that in the meaning of the general statute, chapter 96, section 5, that the probate court may make allowance therefrom to his widow, although the assets are insufficient to pay

---

(*f*) *Lees v. Laforest*, 14 Beav. 250.

the debts of the old firm, to be reimbursed out of the estate of their deceased copartner. (g) They are creditors against

the partnership creditors in full. *Bush v. Clark*, 127 Mass. 111.

A surviving partner may lawfully support the family of his deceased partner out of firm assets for a few weeks after an epidemic of yellow fever, while he is winding up the business. *Roach v. Brannon*, 57 Miss. 490.

A surviving partner cannot transfer or pledge the partnership effects to pay or secure a debt of his own, nor pay the debt of one firm of which he is survivor with the debt of another firm of which he is survivor; but he may transfer the assets of a firm of which he is survivor to pay the debts of that firm. *Gable v. Williams*, 59 Md. 46; *Scott v. Tupper*, 16 Miss. 280; *Allen v. National Bank*, 6 Lea, 558. See, however, *Fitzpatrick v. Flannagan*, 106 U. S. 648; *McGinty v. Flannagan*, id. 661.

A sole surviving partner may pledge or mortgage the assets of partnership to secure a partnership debt, and when such transfer is made in good faith it is effectual against all other creditors as well as the representatives of the deceased partner. *Bohler v. Tappan*, 1 McCrary, 134; S. C. 1 Fed. Rep. 469; *Breen v. Richardson*, 6 Colo. 605.

A surviving partner has no right, as against the heirs of a deceased partner, to mortgage the interest of such deceased partner in lands for any purpose except to close up the business and pay the firm debts. *Brown v. Watson*, 33 N. West. Rep.

(Mich.) 493; S. C. 10 West. Rep. 170.

A surviving partner has no power without the consent and concurrence of the representatives of the deceased partner to make an assignment to a trustee for the benefit of the creditors of the firm by which preferences are created among the creditors. *Nelson v. Tenney*, 36 Hun (N. Y.), 327.

After the death of one partner an assignment of the partnership funds by the surviving partner for the payment of a separate debt of the deceased partner in preference to the partnership debts is void. *Hutchinson v. Smith*, 7 Paige, 26. See, *ante*, *Assignments*.

The surviving member of a firm may give preferences among the partnership creditors under his general authority to wind up the business of the firm. *Roach v. Brannon*, 57 Miss. 490; *Russell v. Stroud*, 12 Weekly Not. Cas. 419 (assignment); *Gallagher's Appeal*, 5 Cent. Rep. 725; S. C. 7 Atl. Rep. 237 (confession of judgment); *Loeschigk v. Hatfield*, 5 Robt. 26; 4 Abb. Pr. N. S. 210. See, however, *Barcroft v. Snodgrass*, 1 Cold. 430; *Anderson v. Norton*, 15 Lea, 14 (deed of trust); *Hutchinson v. Smith*, *supra*. See, *ante*, *Assignments*.

The surviving partners have power to sell and convey the firm real estate without regard to whether this be necessary to pay debts. *Solomon v. Fitzgerald*, 7 Heisk. 552. See, also, *Easton v. Courtwright*, 84 Mo. 27.

---

(g) *Musson v. May*, 3 V. & B. 194.



that estate for what may be due to them from their deceased partner on taking the partnership accounts, and they

A surviving partner cannot bind co-survivors by signing the firm name without their express authority or ratification. *Jenness v. Carleton*, 40 Mich. 343; *Matteson v. Nathanson*, 38 id. 377; *Castle v. Reynolds*, 10 Watts, 51 (a judgment note); *Bank of Port Gibson v. Baugh*, 17 Miss. 290. See, however, *Dundass v. Gallagher*, 4 Pa. St. 205.

A surviving partner cannot bind the estate of his deceased partner by any new contract, acknowledgment or admission, though he may bind himself and thereby authorize a partnership creditor to pursue the partnership assets in his hands; and on a subsequent settlement by him with the representative of the deceased he must show that the debts to the payment of which he has applied the firm assets were the debts of the firm. *Rose v. Gunn*, 79 Ala. 411. See, also, *Weise v. Moore*, 5 West. Rep. 58; *Exchange Bank v. Tracy*, 77 Mo. 593.

Whatever debts are contracted by the surviving partner after the dissolution of the firm are his individual debts, and describing himself as survivor will not change their character. *Haynes v. Brooks*, 42 Hun (N. Y.), 528.

A surviving partner, after the dissolution of the firm by the death of one partner, has no power to renew or continue an existing liability or to change its dignity or nature. *Carter v. Lipsey*, 70 Ga. 417.

The surviving partners cannot, by any act or acknowledgment, re-

vive a debt of the firm or continue it in force as against the estate of the deceased if the debt is otherwise barred as to him. *Espy v. Comer*, 76 Ala. 501.

The surviving partner has, however, the right to use the firm name in which to transact his business. A check drawn on a bank by him, either in the firm name or in his own name as surviving partner, when paid, will protect the bank. *Commercial National Bank v. Proctor*, 98 Ill. 558.

Articles 1138, etc., of the code of Louisiana, entitling the survivor of a commercial partnership to be appointed liquidator of the partnership by the court, where the succession is open, do not apply to testamentary successions. *Klotz v. Macready*, 35 La. Ann. 596.

In no case has the surviving partner a right to such appointment where the articles provide that such survivor shall have a certain term to wind up the business, and during that time, though in possession of all the assets with full power of administration, he has taken no steps towards liquidation. *Klotz v. Macready*, 35 La. Ann. 596.

A surviving partner and liquidator cannot release the partnership's recourse for accommodation acceptances against a party so as to make him a competent witness. *Bookout v. Anderson*, 2 La. Ann. 246.

Delivery by the surviving partner of a note, then assets of the firm, which had been indorsed in the name of the firm by the de-

may, as creditors, bring an action for the administration of his estate. (h) If he has no legal personal representa-

ceased partner in his life-time, is not sufficient to pass the legal title to the purchaser. *Glasscock v. Smith*, 25 Ala. 474.

A surviving partner cannot bind the estate of a deceased member of the firm for debts incurred by him subsequently to its dissolution by the death of such member. *Cook v. Carson*, 45 Tex. 429.

Where a lease to a copartnership gives a privilege to the lessees of continuing the lease for an additional term, upon giving notice of their intention to continue, prior to the termination of the original term, in case of the death of one of the partners the survivor can, as such, give the required notice and enforce a fulfillment of the covenants of the lease for the extended term. *Betts v. June*, 51 N. Y. 274.

If goods shipped and consigned to a firm doing a commission business, to be sold on account of the shipper, are received, but before they are sold one of the partners dies, the survivor may sell such goods, and in such case the claim of the shipper on account of such sale is properly against the firm and not against the survivor individually. *Offutt v. Scott*, 47 Ala. 104.

Where there is an executory agreement between partners for the sale of the firm assets to one of

them, unaccompanied by any actual transfer, and the purchasing partner dies before the time fixed for the delivery, firm assets subsequently found in the hands of the surviving partner, who is also executor of the deceased, will be presumed to be held by him in his character of surviving partner, and not as executor. *Kreis v. Gorton*, 23 Ohio St. 468.

A. agreed with a surviving partner that if he would apply the firm property to the decedent's private debts A. would pay the firm debts. The agreement was held good in a suit thereon against A. by the survivor, and the amount to have been paid by A. was the measure of damages against him. *Weddle v. Stone*, 12 Ind. 625.

A surviving partner who administers upon the partnership affairs may be allowed a credit on his inventory for a debt due by the deceased partner to the firm, and for a debt due by himself to the firm at the same time, both debtors appearing insolvent; and he is not required to class the partnership debts and pay them *pro rata*, but may pay them all in full, as section 63 of article 1 of the administration act does not apply to him. *Crow v. Weidner*, 36 Mo. 412.

In New York, under section 244 of the Code of Procedure, as amended in July, 1851, a partner

(h) See *Robinson v. Alexander*, 2 Cl. & Fin. 717; *Addis v. Knight*, 2 Mer. 119. If the deceased has pledged his real estate to his copartners for a debt due from him

to them, they cannot enforce their security in the absence of his legal personal representative. *Scholefield v. Heafield*, 7 Sim. 667.

tive the probate division of the high court will grant a limited administration to a nominee of the surviving partners,

who by his answer admits that he has in his hands partnership funds, which on his statement appear to belong to the administrators of his deceased partner, will be ordered to pay over such funds to them, although there are outstanding contested claims against the firm, and it has claims to enforce which will require time and disbursements. *Roberts v. Law*, 4 Sandf. 642.

Where one partner dies insolvent, and is at the time of his death indebted individually to the surviving partner individually, and the surviving partner afterwards collects funds of the partnership, he cannot apply the share of the deceased partner to the individual debt due to himself; such share must be paid to the representative of the deceased partner, to be applied to his debts. *Moffat v. Thomson*, 5 Rich. Eq. 155.

The provisions of Revised Statutes of Maine, chapter 69, sections 1 to 4, relating to the settlement of the estate of the deceased partner, do not apply to an account sued in the name of the surviving partners for the benefit of one partner, to whom the account was assigned by the firm during the life-time of all the partners. *Matherson v. Wilkinson*, 79 Me. 159.

Under the provisions of New Hampshire General Statutes, chapter 106, upon the death of either partner the copartnership affairs may be fully adjusted and settled in the probate court, either by the surviving partner or the representative of the deceased partner,

or by arbitration. But if not thus settled they may be adjusted in a court of equity the same as before such statute was enacted. *Scott v. Buffom*, 52 N. H. 345.

A surviving partner has no right to use machinery upon his own personal account to the detriment of the estate of the deceased partner, and will be enjoined, whether the machinery is regarded as realty or personalty. *Stanhope v. Suplee*, 2 Brewst. 455.

*Held*, however, to be error to charge the survivors of a firm of lawyers for the use of a firm library pending the settlement of firm affairs. *Starr v. Case*, 50 Ia. 491.

A surviving partner should not be charged with interest on the firm assets in his hands while winding up firm business, where it does not appear that there was unnecessary delay in closing up the estate, nor that the money of the firm was used by him in the business, nor that he made a profit out of it. *Gregory v. Menefee*, 83 Mo. 413.

Where the surviving partner of a firm collected demands of the firm in Confederate money he was held liable to account to the representatives of the deceased partner in lawful money, it being his duty to have collected in lawful money. *Succession of Wilder*, 21 La. Ann. 371.

A surviving partner who, in good faith and under an honest belief that he has a good defense, resists by litigation, but unsuccessfully, the collection of a claim against

so as to enable them to institute proceedings to have the partnership accounts properly taken. (i)

**Actions by surviving partners against the executors of a deceased partner.**<sup>1</sup>—A surviving partner, if a creditor

the partnership estate, will be entitled to contribution for the reasonable expenses of the litigation as a part of the expenses of winding up the partnership affairs. *Lee v. Dolan*, 39 N. J. Eq. 193.

Where one of two partners dies the survivor is entitled to the possession and disposition of all the partnership property; and in a suit by him instituted for the purpose of closing up the affairs of the co-partnership, and to recover from the estate of the deceased partner any amount due him from the deceased, it will be improper to include in a decree in favor of the survivor any amount invested by the partners in real or personal property, unless such property had been disposed of by the deceased partner, or for his use, in his life-time. The fact that the title to land purchased by partners with partnership funds was taken in the name of the wife of one of the partners, since deceased, or that any of the property of the copartners has been disposed of by the widow, or that she has collected money due on partnership accounts, affords no ground for charging the estate of the deceased partner at the suit of the survivor. A surviving partner cannot charge the estate of the deceased partner for a share of the earnings of the copartnership which remain in open account against their customers, or which were not paid to or realized by the deceased in his

life-time. *Price v. Hicks*, 14 Fla. 565.

(i) *Cawthorn v. Chalie*, 2 Sim. & Stu. 127. The court of chancery would not, in such a case, appoint a person to represent the estate of the deceased. *Rowlands v. Evans*, 33 Beav. 202.

<sup>1</sup>One member of a firm cannot recover from the representatives of the deceased copartner any portion of moneys received by the latter belonging to the firm, unless upon an accounting or settlement of the affairs of the partnership a balance is found due to him. *Arnold v. Arnold*, 90 N. Y. 580.

A surviving partner may recover for the benefit of the firm creditors, in an action at law, from the estate of a deceased partner, any indebtedness due from the deceased to the firm where the partnership is insolvent; but for this purpose he has no preference over any other creditors of the estate. *Bird v. Bird*, 77 Me. 499. See, also, *Sweet v. Taylor*, 36 Hun, 256.

A surviving partner who has not paid all the partnership debts, but has paid thereon all the partnership assets and merely assumed and secured the balance, has no right of action against the estate of the deceased partner. *Huff v. Lutz*, 87 Ind. 471.

Survivors in an action against the administrator of a deceased partner cannot have money, held by the decedent as an individual for the use of a third person, ap-

of the deceased, may sue either in that character for a common administration judgment, or, in the character of a partner, for a judgment for a partnership account, and for payment of what is due on that account; \*and [\*592] if assets are not admitted, then for a judgment for the administration of the estate of the deceased. An action in the alternative may, it is conceived, now be sustained. (j) The legal personal representative of the deceased must be a party if an account of his estate is sought. If there is no such representative, but the assets of the deceased or of the partnership are in danger and the object of the plaintiff is to have them protected, he should confine his claim for relief accordingly and not seek for an account. (k)

**No right to take the share of deceased at a valuation.**—In the absence of an express agreement to that effect the surviving partners have no right to take the share of the deceased partner at a valuation;<sup>1</sup> nor to have it ascertained in any other manner than by a conversion of the partnership assets into money by a sale; (l) nor have they any

propriated to the payment of a debt by such third person to the firm. *Starr v. Case*, 59 Ia. 491.

As to what surviving partners, in a suit against legal representative of deceased partner, must show to recover partnership funds, see *Franklin v. Tonjourns*, 1 Tex. App. (Civ.) 250.

When a partner dies, by will bequeathing his entire interest in the firm property to the surviving partner, the latter cannot collect from the general assets of the decedent a debt due by him to the firm, if the interest of the decedent in the assets of the firm is sufficient to pay it. *Painter v. Painter*, 68 Cal. 395.

(j) Ord. xvi, r. 7.

(k) *Rawlings v. Lambert*, 1 J. & H. 458. Under the new practice a

claim for an account would probably be harmless.

<sup>1</sup> See *Ogden v. Astor*, 4 Sandf. 311.

One partner upon the death of the other is entitled to specific performance of a stipulation in the articles that at the end of three months after the death of either the valuation of all their partnership assets, including real estate, should be made according to the amount of capital invested, and that the survivor should have one year thereafter to take and pay the value of such share to the legal representatives of the decedent. *Maddock v. Astbury*, 32 N. J. Eq. 181.

(l) *Crawshay v. Collins*, 15 Ves. 226, 229; *Featherstonhaugh v. Fenwick*, 17 Ves. 308. See, as to un-

right of pre-emption. (*m*) Even the good-will of the business, if salable, must be sold for the benefit of the estate of the deceased; although the surviving partners are under no obligation to retire from business themselves, and cannot, it seems, be prevented from recommencing business together in the name of the old firm unless the good-will has been sold. (*n*)

**Accounting for subsequent profits.**—In ascertaining the share of the deceased the surviving partners must not only bring into account the assets of the firm which actually existed at the time of his death, but also whatever has been obtained by the employment of those assets up to the time of the closing of the account; for so long as profits are made by the employment of the capital of the deceased partner, so long must such profits be accounted for by the surviving partners. (*o*) The executors of the deceased have, however, the option of taking interest at 5*l.* per cent. (*p*)<sup>1</sup>

salable assets and pending contracts, *ante*, p. 558; and as to the discretion of the court, *ante*, p. 556.

(*m*) *Brown v. Gellatly*, 31 Beav. 243.

(*n*) See *ante*, p. 436 *et seq.*

(*o*) See *ante*, p. 521 *et seq.*

(*p*) *Ante*, p. 528.

<sup>1</sup>If the survivors of a partnership carry on the concern and enter into new transactions with the partnership funds, they do so at their peril, and the representatives of a deceased partner may elect to call on them for the capital with a share of the profits or with interest. If no profits were made, or even if a loss is incurred, they must be charged with interest on the funds they use, and they must bear the whole loss. *Franklin v. Tonjours*, 1 Tex. App. (Civ.) 250; *Brown's Appeal*, 89 Pa. St. 139; *Goodburn v. Stevens*, 1 Md.

Ch. 420; *Millard v. Ramsdell*, Harr. Ch. 373. See, also, *Ogden v. Astor*, 4 Sandf. 311.

But profits cannot be claimed for one period and interest for another. *Goodburn v. Stevens*, *supra*.

Where the interest of the deceased partner had become vested in one of the surviving partners, who consented to the continuance of the copartnership, the rule first above stated was held not to apply. *Millard v. Ramsdell*, *supra*.

As to the election of the representative of the deceased partner to share in the profits instead of the rents of partnership property, see *Berry v. Folkes*, 60 Miss. 576.

The admission of a new partner will not alter the rights and powers of a surviving partner, if the stock remained an asset of the old firm; if it becomes an asset of the new firm the surviving partner has power to represent the firm as to

such stock. *Kenton Furnace, etc. Co. v. McAlin*, 5 Fed. Rep. 737.

A survivor who has taken no part with the others in carrying on the partnership business is not bound by any implication that they constitute a new firm. *Matteson v. Nathanson*, 38 Mich. 377.

The survivor of two partners is not to be charged in behalf of the decedent's estate as for gains or losses resulting in the business upon changes or improvements which had been entered upon with the consent and at the expense of both, but the benefit of which one did not live to obtain. *Chittenden v. Witbeck*, 50 Mich. 401.

A survivor of a firm of hotel-keepers continued temporarily to use the furniture belonging to the firm, and carried on the business after the death of his partner, against the protest of the latter's representative, who required its removal from the premises. *Held*, that the survivor could not be required to account for profits in business during its continuance and the use of the furniture under such circumstances; held liable only for its deterioration or destruction while so used, and for interest upon the amount. *Chittenden v. Witbeck*, 50 Mich. 401.

Where the survivor did not intend to *continue* the firm business in the sense condemned by law, but did, under a mistaken idea that he was bound to complete a verbal agreement with another firm of which the survivor and the deceased partner, with another, were members, continue to receive lumber under a contract with such firm, such survivor ought not to be charged as with a conversion

of the whole partnership property unless the business was in fact so transacted by him as inseparably to commingle the property of the late firm with that which was put into the business after his partner's death, so that one cannot be distinguished from the other. If the property was so intermingled he will be liable to be treated as having converted the assets of the firm to his own use, and should be held to account for the deceased partner's net interest in the partnership assets at the time of his death, and will be chargeable with interest thereon. *Oliver v. Forrester*, 96 Ill. 315.

The fact that the surviving partners continue business after the death of a partner, and that the firm assets were conveyed to one of them under an agreement between them, in consideration of his assuming certain mortgages upon firm property, which agreement was carried out, and that the property so turned over to him did not exceed seventy-five per cent. of the indebtedness which he had assumed, do not affect the rights of defendant claiming as heir at law of the deceased partner. *Jenness v. Smith*, 7 West. R. 323.

If the executors continue the business with the surviving partners without authority, the testator's interest is not liable for debts contracted after his death, nor is property owned by the firm before his death appropriable in the first instance. *Citizens' Mutual Insurance Co. v. Lignon*, 59 Miss. 305.

A surviving partner is not bound

to force the stock of the firm upon the market at a dull season for making sales when there is but little demand for it and thus sacrifice the property; and if an accidental loss of the stock occurs by fire during a reasonable delay for the purpose of sale, the estate of the deceased partner must bear its share of such loss. *Oliver v. Forrester*, 96 Ill. 315.

While a surviving partner cannot enter into contracts or create liabilities which shall bind the estate of his deceased partner, he is not bound to sacrifice the interest of the firm; and if he contracts debts *bona fide* for the interest of the common property, he may pay them out of the firm funds. *Calvert v. Miller*, 94 N. C. 600.

Thus where, on the death of a partner, the firm had a large amount of unfinished work and raw material on hand which could only be disposed of at a sacrifice, it was held that creditors advancing money to the survivor in good faith to enable him to finish the work and use up the raw material were entitled to payment out of the partnership assets. *Calvert v. Miller*, 94 N. C. 600.

While a surviving partner in a mercantile business may make small purchases of some articles in stock to render it more salable and to enable him to close it out, he has no power to make large purchases intended to continue the business. *Oliver v. Forrester*, 96 Ill. 315.

If a surviving partner purchases and adds goods to the partnership assets, such purchases are individual assets of the survivor, and are first liable to the satisfaction of

his individual creditors. *Cowen v. Gill*, 11 Lea (Tenn.), 674.

If the surviving partner commingles his individual property with the firm assets, his individual creditors do not thereby lose their claim on the property, but an accounting will be ordered to ascertain the amount of individual and partnership assets. *Cowen v. Gill*, 11 Lea (Tenn.), 674.

Where a surviving partner, who is also a trustee of his deceased partner, neglects to separate his deceased partner's share, but wrongfully allows it to remain in the business, he is to be treated as if he had separated and misappropriated it, and the *cestuis que trustent* are entitled to demand of him its value, and to receive that amount from the assets of the firm which came into his hands from whatever property has been purchased with its proceeds. *Hooley v. Gieve*, 9 Abb. N. C. 8; S. C. 9 Daly, 104.

When a surviving partner invests in lands money belonging to the firm or belonging entirely to the estate of a deceased partner, taking the title in his own name, the representatives of the deceased partner may, at their option, ratify the investment and claim their proportionate interest, or recover the money so invested without their authority, and fasten a lien upon the land for its repayment. But until they assert their right to the land their claim is a money demand springing out of account, and, if it has become barred by the statute of non-claim, can be the foundation of a claim to the lands. *Morgan v. Morgan*, 68 Ala. 80.

An administrator permitted the



**Allowance for carrying on business.**—On the other hand the surviving partners are entitled, if they carry on the business for the benefit of the estate of the \*deceased partner, to an allowance for so doing;<sup>1</sup> [\*593]

firm business to be carried on by the survivor, and the result was a profit and increase in the value of the firm assets. When the business was finally closed and the assets sold, the firm was found to be insolvent, which was also the case at the time of the decedent's death. Decedent had no property other than his interest in the firm. *Held*, that the administrator should not be surcharged, he not having adventured or lost in the business any estate of the decedent, and that he was properly allowed credit for expenses of the administration and \$100 for services. *Stern's Appeal*, 95 Pa. St. 504.

A surviving member of a firm who uses an account of the firm, supposed to have accrued before the death of his partner, against one of their clients in a transaction with such client, by which the survivor makes the claim available, is chargeable with such claim as an asset of the firm, notwithstanding the party allowing the claim swears that no such sum was due. *Sanderson v. Sanderson*, 17 Fla. 820; S. C. 20 Fla. 292.

<sup>1</sup>*Griggs v. Clark*, 23 Cal. 427; *Newell v. Humphrey*, 37 Vt. 265.

In an action for an account between the survivor and the administratrix of a deceased partner, the former is entitled to an allowance for sums drawn by the deceased from the firm during his lifetime, notwithstanding the claim has not been presented to the ad-

ministratrix for allowance and approval. *Manuel v. Escolle*, 65 Cal. 110.

In an action for an account between a surviving partner and the representatives of a deceased partner, the former is entitled to credit for all the sums paid by him to the latter after their appointment out of funds collected by him as surviving partner. *Collender v. Phelan*, 79 N. Y. 366.

A surviving partner who advances money from time to time from his own funds in excess of the amount in his hands as surviving partner, for the purpose of paying the indebtedness of the firm, is entitled to interest on such advances. *Collender v. Phelan*, 79 N. Y., 366.

The claims of a surviving partner upon the proceeds of sale of decedent's one-half of real estate, to reimburse him to the amount of one-half the expenditures incurred in the conduct of joint business and improvements put upon the property, constituted a prior incumbrance, and must be paid to the postponement of creditors of the deceased partner. See *Bat. Rev. ch. 42, sec. 2. Mendenhall v. Bendow*, 84 N. C. 646.

A surviving partner's investment of part of the firm assets in a retail liquor license is no ground for attachment if he owes no individual debts and intends to sell out the stock, consisting entirely of liquor, in order to realize more for the firm

unless they are also his executors, in which case they can make no charge for their trouble. (*q*)

**Position of the executors of the deceased.**—The right of the executors as against the surviving partners is simply to have the share of the deceased ascertained and paid;<sup>1</sup>

creditors. *Roach v. Brannon*, 57 Miss. 490.

Where a firm has taken a long lease of land under an agreement to build houses thereon, and one of them dies, the survivor has a right to finish the houses and to charge the interest of the deceased with its proportion of the expenditures incident thereto. *Rust v. Chisolm*, 57 Md. 376.

Where the business of a trading partnership is continued for a considerable time after the death of one of the partners, whose personal representative, in seeking a settlement of the partnership accounts in equity, elects to have a report and decree for the profits which accrued during that time, the surviving partner is entitled at least to an allowance and deduction for "tavern bills and other expenses incurred in the adjustment and settling up the affairs of the partnership." *Oreilly v. Brady*, 28 Ala. 530.

Where plaintiff and decedent were partners, and plaintiff paid debts and performed other services in winding up the affairs of the firm, commissions were allowed on money collected and interest on the decedent's share of moneys advanced by the plaintiff, it having been agreed that he should collect "at the proper cost and charges of the two" individually. *Wood v. Wood*, 26 Barb. 356.

The natural tutor who supervises

the interest of his minor child in the liquidation of a partnership of which the deceased mother of the minor was a partner cannot claim for services rendered the partnership; he has only a claim against his ward in his account of tutorship. *McMichael v. Raoul*, 14 La. Ann. 307.

(*q*) *Ibid.*

<sup>1</sup> *Grim's Appeal*, 105 Pa. St. 375; S. C. 15 Weekly Not. Cas. 273; *Miller v. Coffman*, 16 Weekly Not. Cas. 423.

The administrator of the estate of a decedent has nothing to do with his partnership interest except to see that no waste or fraud is committed in its management until the surviving partner has settled up the partnership, paid its debts and turned over to the administrator his intestate's proportion; until then the administrator is not entitled to the possession of the intestate's interest, nor does his liability for that portion of the estate commence. In making his inventory it should be referred to as a partnership interest. *In re Armstrong*, 6 West. R. 124.

The executor cannot compel continuance of the business. *Grim's Appeal*, *supra*.

If it is found, on accounting, that there is a balance due to the surviving partner, the orphans' court has jurisdiction to allow his claim out of the estate of the decedent. *Miller v. Coffman*, 16 Weekly Not. Cas. 423.

but this frequently cannot be done without a general sale and winding up of the partnership.

A *bona fide* sale, however, by the executors to the surviving partners, can generally be made with safety if no surviving partner is an executor. (r)<sup>1</sup> Where, however, a sale

The surviving partners, having a right to settle the business of the firm, cannot be required to turn over the decedent's interest therein to his personal representative till after payment of the partnership debts and an accounting whereby the amount of such interest is determined. *Camp v. Fraser*, 4 Dem. (N. Y.) 212.

The surviving partner of a commercial firm is not liable as a liquidator to account to the succession of his deceased partner for any single item of indebtedness to the succession, but to pay over the entire sum found to be due the succession on the settlement of the partnership. *Walmsley v. Mendelsohn*, 31 La. Ann. 152.

A surviving partner cannot be held to account to the heirs of his deceased partner where the estate of such decedent is in probate, although he is himself the administrator; the remedy of the heirs, if not satisfied with his action, is to apply for his removal and the appointment of a new administrator. *Hutton v. Laws*, 55 Ia. 710.

(r) See *infra*, § 3. *Coburn v. Collins*, 35 Ch. D. 373, shows that the Bills of Sale Acts must not be overlooked in transactions of this kind.

<sup>1</sup> An administrator of a deceased partner has power to settle with the surviving partners on such terms as in the exercise of good faith and reasonable diligence he

may choose to accept. He is the personal representative of the deceased partner, and has all his powers of settlement, except that, being trustee for the next of kin, he cannot give away anything. *Hoyt v. Sprague*, 12 Chicago Leg. News, 25; *Sage v. Woodin*, 66 N. Y. 578; *Grim's Appeal*, 105 Pa. St. 375; S. C. 15 Weekly Not. Cas. 273.

Such settlement is conclusive upon the parties and upon all persons claiming through them, including the creditor of the deceased partner. *Sage v. Woodin*, *supra*.

A sale by the executor of a deceased partner to the surviving partner of "all the interest in a flour mill and property of the firm which the testator had at the time of his death or which the executor then had, the sale to include debts due said firm by account or otherwise," will pass profits earned by the firm property in the hands of the survivor, subsequent to the death of the testator. *Kimball v. Lincoln*, 99 Ill. 578; S. C. 5 Bradw. 316; 7 Bradw. 470.

As to the construction of a special contract between the executors of two deceased partners and the surviving partner, relative to the assets and payment of the debts, see *Babb v. Mosby*, 7 Lea (Tenn.), 105.

While the court of equity may, in the absence of unfairness or imposition, enforce a contract by the

of the share of the deceased cannot be effected by private arrangement, the executors must enforce a general sale and winding up for their own safety, unless the persons interested in the estate of the deceased assent to the adoption of some other course. And even if they do it must not be forgotten that the executors may not be able, without risk to themselves, to continue the share of the deceased in the business, and take the profits accruing in respect of it; for by sharing profits made after the death of the deceased the

representative of a deceased partner to purchase of the survivor the lands of the partnership, or may, in case such performance be impossible or impracticable, award compensation, if the complainant's remedy at law be uncertain or inefficacious, and such compensation be indispensable to his relief in equity, yet, if the complainant's action or inaction has hindered or prevented the defendant from performing his contract, the court of equity, in its discretion, will refuse relief. *Ludlum v. Buckingham*, 35 N. J. Eq. 71; S. C. 39 N. J. Eq. 563.

A *bona fide* agreement by the administrators of a member of a partnership for buying and selling land, to relinquish the deceased partner's right in an executory contract to buy some land to the surviving partner, rather than pay their share of the price then coming due, will be valid, and will not be overthrown after a lapse of time at the application of the heirs of the deceased partner. *Ludlow v. Cooper*, 4 Ohio St. 1.

Where two partners agree in writing that in case of the death of either the survivor shall settle the firm business, and after paying the joint debts of the firm and of

the deceased shall have all the remaining property for his sole use and benefit, without any process of law whatsoever, accounting only to the creditors of the firm and of the deceased partner, an action lies where the plaintiff offers to perform all the terms and conditions of the agreement, after the death of one of the parties, to require the administrator of the deceased to turn over to the survivor all the property in his possession belonging to the estate of the deceased. *Eldred v. Warner*, 1 Ariz. 175.

Contract for the sale to a surviving partner of the interest of a deceased partner, construed as affording inference of intention that survivor should continue the business for his sole account and benefit. *Collender v. Phelan*, 79 N. Y. 366.

Money belonging to a firm, placed in bank in the name of the firm by a partner who is an executor of the deceased partner, and by him checked out in payment of debts of the firm, with his co-executor's consent, will, as to the payees, be considered as firm assets, notwithstanding a private agreement between the executors that it belonged to the estate. *Kreis v. Gordon*, 55 Mo. 468.

executors, although they are only trustees for others, may become liable as partners with the surviving partners; and may, therefore, become liable to be adjudicated bankrupt and to be compelled personally to pay debts contracted in carrying on the business. (s) The position of the executors of a deceased partner is, in fact, often one of considerable hardship and difficulty; if they insist on an immediate winding up of the firm they may ruin those whom the deceased may have been most anxious to benefit; whilst if for their advantage the partnership is allowed to go on the executors may run the risk of being ruined themselves.

**Effect of making a copartner an executor.**—With a view to obviate this, it is not unusual for one partner to make his copartner his executor; but the difficulty of the executor's position is thus rather increased than diminished; for his own personal interest as a surviving partner is brought \*into direct conflict with his duty as an [\*594] executor.<sup>1</sup> Everything, therefore, which he does is

(s) Formerly they always did incur this liability. See *Ex parte* Holdsworth, 1 M. D. & D. 475; *Wightman v. Townroe*, 1 M. & S. 412; *Ex parte* Garland, 10 Ves. 119. But see, now, *Holme v. Hammond*, L. R. 7 Ex. 218, noticed *ante*, p. 32.

<sup>1</sup> A surviving partner ought not to be appointed administrator of his deceased partner. *Brown's Estate*, 11 Phila. 127.

The administrator of a deceased partner is responsible for any money wrongfully paid out of the funds which have actually been in his hands officially, and for any allowance voluntarily made by him against the estate without some legal or equitable warrant. *Loomis v. Armstrong*, 49 Mich. 521.

In accounting for such assets as consist of the partnership interest,

he can be charged only with what he actually received or ought to have obtained from the survivor or from other sources, unless losses occurred through his own fault or connivance. He should be credited with any proper disposal of such assets by return or otherwise. *Loomis v. Armstrong*, 49 Mich. 521.

An administrator, who is also the surviving partner, cannot be surcharged with the interest of the deceased partner in the firm before the final settlement by him of the partnership affairs. Until that time the title to the firm assets is in him only as surviving partner for the purpose of settling up the affairs of the firm. *Shipe's Appeal*, 18 Weekly Not. Cas. 278.

The executor or administrator of a surviving partner who dies

liable to question and misconstruction on the part of the persons beneficially entitled to the estate of the deceased; and he is practically much more fettered in the discharge of his duties, and in the exercise of his rights, than if he had not to act in the double character imposed upon him. (t) This will appear in the section in which it is proposed to examine the rights of the separate creditors and legatees of the deceased against his executors and his surviving partners.

**Actions for indemnifying executors.**—Where a deceased partner's estate is administered under the order of the court his executors, if they act properly, are personally protected from all consequences, and no action can be sustained against them in respect of what they so do. (u) If there are liabilities which will have to be met, the court will order part of the assets to be set aside to meet them when they arise. (x) But if the liabilities are remote and contingent,

with firm assets in his possession and while he is engaged in settling the firm business is entitled to possession of such assets, and is charged with the duty of completing such settlement, unless relieved from that duty by contract or by the order of a competent court. *Dayton v. Bartlett*, 38 Ohio St. 357.

The title acquired under a sale by a surviving partner as administrator is superior to that acquired at a prior foreclosure sale under a deed of trust executed by one partner upon his interest in the property. *Priest v. Chouteau*, 12 Mo. App. 252.

As to the administration of partnership estates by the survivor under the Missouri statute, see *Easton v. Courtwright*, 84 Mo. 27.

It is only where the surviving partner has failed to give the bond required by section 62, Revised Statutes of Missouri, and the ad-

ministrator of the individual estate has further qualified by giving the bond required by said section, that the latter intermeddle with the partnership assets. *Matney v. Gregg*, 19 Mo. App. 107.

Where the administrator of a deceased member gives a bond and takes possession of the assets as provided by the Maine statute, the survivor having declined to give the bond, the firm creditor may maintain an action against such administrator in case of his refusal to pay his debt. *Bass v. Emery*, 74 Me. 338.

(t) See some general remarks on this subject in *Hutton v. Rossiter*, 7 De G. M. & G. 12.

(u) *Waller v. Barrett*, 24 Beav. 413.

(x) *Fletcher v. Stevenson*, 3 Ha. 360; *Brewer v. Pocock*, 23 Beav. 310.

and may possibly never arise at all, the utmost that the executors can obtain in the shape of indemnity, in addition to that afforded by the orders of the court itself, is a covenant from the testator's legatees or next of kin. (*y*)

**Succession duty.**—No succession duty is payable by surviving partners on the death of a member of the firm, even although they may benefit thereby (*z*)

## SECTION II.—CONSEQUENCES AS REGARDS JOINT CREDITORS.

### 1. *With reference to what occurred before death.*

**Position of executors of deceased partner as regards creditors of the firm.**—The position of the executors of a deceased partner, with reference to the creditors of the firm, has, to a considerable extent, been already ascertained. For it has been seen:

\*1. That, notwithstanding the death of a partner, [\*595] his estate is liable to the creditors of the firm; and not only in respect of the debts contracted in his life-time, in the ordinary way of business, but also in respect of debts arising from breaches of trust committed in his life-time by himself, or his copartners, and imputable to the firm. (*a*)

2. That the liability cannot be got rid of by any arrangement between the executors of the deceased and the surviving partners; and that, notwithstanding subsequent dealings between the creditors and the surviving partners, the liability of the executors continues, until it can be shown that the creditors have abandoned their right to obtain payment from the estate of the deceased, or that their demands have, in fact, been paid or discharged. (*b*)

3. That this liability does not extend to ordinary torts; for as to them *actio personalis moritur cum persona*. (*c*)

(*y*) See *Dean v. Allen*, 20 Beav. & J. 398. Compare *Crossman v. 1; Waller v. Barrett*, 24 id. 413; *The Queen*, 18 Q. B. D. 256. *Addams v. Ferick*, 26 Beav. 384; (*a*) *Ante*, p. 194 *et seq.* *Bennett v. Lytton*, 2 J. & H. 155. (*b*) *Ante*, p. 239 *et seq.*

(*z*) *Oldfield v. Preston*, 3 De G. F. (*c*) *Ante*, p. 198 *et seq.* The act

**Summary of cases.**—These propositions have been already so fully illustrated in various portions of the present treatise that it is unnecessary here to do more than collect the cases establishing them.

**Estate of deceased discharged.**—1. *Cases in which by death alone a partner's liability has been extinguished:*

Sumner v. Powell, 2 Mer. 30, and Turn. & R. 423 (*ante*, p. 196).

Clarke v. Bickers, 14 Sim. 639 (*ante*, p. 196).

Wilmer v. Currey, 2 De G. & Sm. 347 (*ante*, p. 197).

Hill's Case, 20 Eq. 585. Joint holders of shares.

**Estate of deceased not discharged.**—2. *Cases in which the estate of a deceased partner has been held liable: (d)*

[\*596] \**Liability in respect of contracts.*

Beresford v. Browning, 20 Eq. 564 (*ante*, p. 194).

Lane v. Williams, 2 Vern. 292.

Simpson v. Vaughan, 2 Atk. 31.

Darwent v. Walton, *id.* 510.

Clavering v. Westley, 3 P. W. 402.

Bishop v. Church, 2 Ves. Sr. 100 and 371 (*ante*, p. 194).

Jacomb v. Harwood, *id.* 265.

Burn v. Burn, 3 Ves. 573 (*ante*, p. 195).

Thomas v. Frazer, 3 Ves. 399.

Orr v. Chase, 1 Mer. 729.

Harris v. Farwell, 13 Beav. 403.

Devaynes v. Noble, 1 Mer. 539, and 2 R. & M. 495.

Wilkinson v. Henderson, 1 M. & K. 583.

Thorpe v. Jackson, 2 Y. & C. Ex. 553.

Hills v. McRae, 9 Ha. 297.

Brett v. Beckwith, 3 Jur. N. S. 31, M. R. (*post*, p. 600).

Cheetham v. Crook, McCl. & Y. 307.

3 and 4 Wm. 4, ch. 42, § 2, gives a remedy against the executors of a person who commits a tort within six months of his death, provided such tort affects the real or personal property of the person injured. See Phillips v. Homfray, 11 App. Ca. 466, and 24 Ch. D. 439. As to frauds, see New Sombrero Phosphate Co. v. Erlanger, 3 App. Ca. 1218, and 5 Ch. D. 73; Peek v. Gurney, L. R. 6 Ho. Lo. 377, and 13 Eq. 79; Davidson v. Tulloch, 3 McQu. 783; Twycross v. Grant, 4 C. P. D. 40; and as to slander of title to trade-marks, Hatchard v. Mège, 18 Q. B. D. 771. (d) See the celebrated judgment in Devaynes v. Noble, 1 Mer. 539, and 2 R. & M. 495.



*Liability in respect of frauds and breaches of trust.*

New Sombrero Phosphate Co. v. Erlanger, 5 Ch. D. 73, and 3 App. Ca. 1218.

Blair v. Bromley, 2 Ph. 354 (*ante*, p. 153).

Sadler v. Lee, 6 Beav. 324 (*ante*, p. 153).

Vulliamy v. Noble, 3 Mer. 619.

Devaynes v. Noble.

Clayton's Case, 1 Mer. 576 (*ante*, pp. 152, 236).

Baring's Case, *id.* 612 (*ante*, p. 152).

Warde's Case, *id.* 624.

**Estate of deceased not discharged by what has occurred since his death.**—3. *Cases in which the estate of a deceased partner has been held liable, notwithstanding dealings between the creditors of the firm and the surviving partners:*

Devaynes v. Noble.

Sleech's Case, 1 Mer. 539.

Clayton's Case, *id.* 579 (*ante*, pp. 152, 236).

Palmer's Case, *id.* 623.

Braithwaite v. Britain, 1 Keen, 206.

Winter v. Innes, 4 M. & Cr. 101 (a very important case).

Harris v. Farwell, 15 Beav. 31 (*ante*, p. 251).

Daniel v. Cross, 3 Ves. 277.

Jacomb v. Harwood, 2 Ves. Sr. 265.

Re Hodgson, 31 Ch. D. 177.

**Estate of deceased discharged by what has occurred since his death.**—4. *Cases in which the estate of a deceased partner has been held discharged by what has taken place between the creditor and the surviving partners:*

*\*By general dealings.*

[\*597]

Oakeley v. Pasheller, 10 Bli. 548, and 4 Cl. & Fin. 207 (*ante*, p. 251).

Brown v. Gordon, 16 Beav. 302 (*ante*, p. 252).

Wilson v. Lloyd, 16 Eq. 60, which cannot, however, be relied on (see *ante*, pp. 239, 251).

*By payment.*

Devaynes v. Noble.

Clayton's Case, 1 Mer. 572 (*ante*, p. 228).

Merriman v. Ward, 1 J. & H. 371. This case is important as showing that where a debt of a deceased partner has been discharged by the application of the rule in Clayton's Case, it is not competent for his executors to revive such a debt against his estate.

**Statute of limitations — Right of creditor of firm to be paid out of the estate of a deceased partner.**—The estate of a deceased partner may be discharged by the statute of limitations; and now, by the Mercantile Law Amendment Act, payments by the surviving partners will not keep alive the creditor's claim against the executors of the deceased. (*e*) The effect in equity of such payments before the passing of the act in question was by no means clearly settled; (*f*) but whatever doubt there may formerly have been upon the subject, it has been long settled that a creditor of the firm can proceed against the estate of a deceased partner without first having recourse to the surviving partners, and without reference to the state of the accounts between them and the deceased. (*g*)<sup>1</sup> But it is necessary to make

(*e*) 19 and 20 Vict. ch. 97, § 14. See *Thompson v. Waithman*, 3 Drew. 628, which, although wrong as regards the retrospective operation of the act (*Jackson v. Woolley*, 8 E. & B. 778), is in other respects correct. *Ante*, p. 263.

(*f*) Compare *Winter v. Innes*, 4 M. & Cr. 101, and *Braithwaite v. Britain*, 1 Keen, 206, with *Way v. Bassett*, 5 Ha. 55, and *Brown v. Gordon*, 16 Beav. 302. See, also, *ante*, pp. 261, 262.

(*g*) *Re Hodgson*, 31 Ch. D. 177; *Re McRae*, 25 id. 16; *Wilkinson v. Henderson*, 1 M. & K. 582; *Devaynes v. Noble*, 2 R. & M. 495; *Thorpe v. Jackson*, 2 Y. & C. Ex. 553. See *ante*, p. 195.

<sup>1</sup>When a creditor seeks to subject the estate of the deceased partner to the payment of an alleged partnership debt he must show that it was contracted by the partnership during its existence. *Rose v. Gunn*, 79 Ala. 411.

That the creditor looked to the survivors for payment, and accepted interest from them and

asked them to pay part of his debts, and did not press them for payment until fourteen months after the death of the deceased partner, raises no presumption that he has agreed to release representative of the decedent. *Fogarty v. Cullen*, 49 N. Y. Super. Ct. 397.

Except in case of death of a co-partner, creditors of a partnership can enforce their claims which are purely legal against the property of the partnership only at law. *Parish v. Lewis*, 1 Freem. Ch. (Miss.) 299.

The death of one partner is not alone sufficient to entitle a creditor of the partnership to go into chancery to enforce the collection of his debt. *Pearson v. Keedy*, 6 B. Mon. 128.

The estate of a deceased partner cannot be pursued, in law or equity, while the surviving partner is solvent. *Alsop v. Mather*, 8 Conn. 584; *Troy Iron & Nail Factory v. Winslow*, 11 Blatchf. 513. See, *ante*, 665, note.

It is, however, in equity liable

the surviving partners parties to the action, for they are interested in the issues raised between him and the executors. (*h*)

for partnership debts if the surviving partner be insolvent. *Caldwell v. Stileman*, 1 Rawle, 212; *Sale v. Dishman*, 3 Leigh, 548; *Storer v. Hinkley*, Kirby, 147; *Stahl v. Stahl*, 2 Lans. 60; *Philson v. Bampfield*, 1 Brev. 202; *Emanuel v. Bird*, 19 Ala. 596. See *ante*, 665, note. See *Waldron v. Simmons*, 28 Ala. 629; *Freeman v. Stewart*, 41 Miss. 138; *McLain v. Carson*, 4 Ark. 164.

A partnership creditor recovered judgment on his claim against the surviving partner, who died, and his administrators exhausted his personal assets in paying other debts; whereupon he filed a bill against such administrators and the heirs of a surviving partner, and made the representatives of the deceased partner parties, to subject the land possessed at his decease by the surviving partner, some of which belonged to the firm, in the first instance, and then to charge the representatives of the partner who first deceased. *Held*, that equity had jurisdiction in the case, and that the representatives of the deceased partner were properly made parties. *Jackson v. King*, 8 Leigh, 689.

Administrators of A. brought a bill to foreclose a mortgage made by B., a late partner of A., to the administrators to secure an indi-

vidual debt between them, and also to secure to A.'s estate the share of the property of the firm, the business of which B. had undertaken to settle up. *Held*, that this mortgage belonged to A.'s estate, and that the firm creditors were not entitled to have the proceeds of it while B. was solvent. *Wimpee v. Mitchell*, 29 Ga. 276.

A claim on a judgment recovered against a surviving partner can be enforced against the estate of the deceased partner in equity only, and must, therefore, be subject to such equitable rules as obtain in reference to the payment of partnership individual debts. *Weyer v. Thornburgh*, 15 Ind. 124.

M. and P. were in partnership as attorneys at law. The firm received and receipted for claims for collection by suit or otherwise. Suits were instituted and judgments recovered upon them in the life-time of M.; and after his death the money was collected by P., but was not paid to the claimants. P. subsequently died insolvent. There were no assets of the firm of M. & P. to be applied to the payment of the claims. *Held*, that the separate estate of M. was liable for their payment. *McGill v. McGill*, 2 Metc. (Ky.) 258. See, also, *Heber-son v. Jepherson*, 10 Pa. St. 124.

The creditor of a partnership

(*h*) See, in addition to the cases in the last note, *Hills v. McRae*, 9 Ha. 297; *Devaynes v. Noble*, *Sleech's Case*, 1 Mer. 539; *Stephen-son v. Chiswell*, 3 Ves. 566. In

*Rice v. Gordon*, 11 Beav. 265, one of the cases of this class, the debt due to the plaintiff arose out of a transaction in which he had engaged as surety.

[\*598] **\*Creditor's suit for administration of deceased partner's estate.**— But, as pointed out in an earlier chapter (Bk. II, ch. 2, § 1), a creditor of the firm is not ip

cannot proceed in equity against the estate of a deceased partner without first exhausting his remedy at law against the surviving partners, or showing that legal process against them would be unavailing. *Slatter v. Carroll*, 2 Sandf. Ch. 573; *Lawrence v. Trustees*, 2 Den. 577; *Voorhis v. Child*, 17 N. Y. 354; *Copcutt v. Merchant*, 4 Bradf. 18. See *Nelson v. Hill*, 5 How. 127; *Fillyall v. Laverty*, 3 Fla. 72; *Postlewait v. Howes*, 3 Iowa, 365; *Creswell v. Blank*, 3 Grant, Cas. 320; *Moore's Appeal*, 34 Pa. St. 411; *Maxey v. Averill*, 2 B. Mon. 107.

Where a surviving partner is insolvent it is not necessary to obtain a judgment against him before proceeding against the equitable assets of a deceased partner's estate. *Vance v. Cowing*, 13 Ind. 460. See, also, *Horsev v. Heath*, 5 Ohio, 353.

Where one of two partners dies, and judgment is recovered against the surviving partner for a partnership debt, and he becomes a bankrupt before the judgment is satisfied, the executors of the other may be compelled in chancery to make satisfaction. *Storer v. Hinkley*, Kirby, 147.

Upon the dissolution of a partnership the debts due the partnership were assigned to one of the partners, who afterward died, and the surviving partner moved out of the state, and his residence was unknown to the representatives of the deceased partner. *Held*, that they might come into equity to re-

cover the debts. *Drake v. Blount*, 2 Dev. Eq. 353.

A sheriff's return on an execution against two surviving partners of *nulla bona*, that he could not find one either in his precinct or the state, and that the other was too sick to be committed to jail without danger of life, shows a sufficient compliance with the statute prescribing that surviving partners shall be pursued to final judgment and execution before a claim against the firm shall be valid against a representative of a deceased copartner. *Shaw v. Knowles*, 3 R. I. 112.

An accommodation indorser of the note of a firm, after the death of one of the partners, indorsed a new note in the same capacity, made by the surviving partner and the administratrix of the deceased partner, for the purpose of continuing the same indebtedness. The first note being taken up, the holder of the second note recovered judgment thereon against the indorser, who satisfied the same, and filed his bill to charge the estate of the deceased partner, upon the allegation that the makers of the note were insolvent. *Held*, that the estate of the deceased was relieved from the payment of the debt, and that the only equity of the complainant in his estate was to subject the interest of the surviving partner, and the administratrix therein, to the payment of his debt. *Brown v. Lang*, 4 Ala. 50.

The laches of a creditor of a partnership will bar his remedy against

the same position as a separate creditor as regards the estate of a deceased partner. A creditor of the firm, unless he is also a separate creditor of the deceased partner, is not entitled to the ordinary judgment for the administration of the estate of the deceased, and cannot compete with an

the estate of a deceased partner, but what shall amount to laches in prosecuting his claim will depend upon the circumstances of each particular case. *Jackson v. King*, 12 Gratt. 499.

A., B. and C. being partners in a manufacturing business, A. made his will, by which he directed his interest in this establishment, viz., the buildings, machinery, stock, privileges and profits thereof, to be continued therein for the term of four years after his decease; and that at the expiration of that term this property and the profits accruing thereon, together with all the testator's other estate, real and personal, should be divided and distributed to D. and others. B., the executor of A., after A.'s death, carried on the business in the partnership name for the term specified. It proved to be a losing concern. A large sum was due from A.'s estate to the company beyond his share of the partnership property. A large sum was also due from the company to C., who had paid a part, and would be obliged to pay the residue, of the outstanding debts of the company, which were considerable in amount, B. having failed and absconded. Previous to the expiration of the four years, the time limited by the court of probate for the exhibition of claims against the estate of A. had

expired, and the executor had proceeded in the settlement of the estate without reference to the partnership fund, and had caused distribution to be made according to the provisions in the will. On a bill in chancery brought by C. against the executor and devisees of A., seeking satisfaction of his claims out of the general assets of A., it was *held* (1) that the partnership creditors had no lien on the estate in the hands of the devisees, by reason of their right to participate, eventually, in the profits of the trade; (2) that the general assets were not liable to the plaintiff's claim by virtue of the testator's last will; and (3) that the plaintiff's remedy was not in chancery, but by a demand on the executor, to be pursued like other claims of a general nature against the testator's estate. *Pitkin v. Pitkin*, 7 Conn. 307.

A bill in equity by a surviving partner to administer lands bought with partnership funds should be framed on the theory of a settlement of the accounts between the complainant and the intestate, and between them and the creditors, so that all the creditors may have an opportunity to present their claims, and a proper distribution of the proceeds of the sale of the land can be made. *Whitney v. Cotten*, 58 Miss. 689.

ordinary separate creditor in the administration of such estate. (i) The right of the creditor of the firm is to have the separate estate of the deceased ascertained and applied in payment of his separate debts and liabilities, and to have the surplus applied in payment of his joint liabilities. (k) If an action has already been brought for the administration of the estate of the deceased, a creditor of the firm can obtain an order to the above effect without being compelled to bring a separate action himself. (l) If necessary he can bring an action himself; (m) but it is doubtful whether he can proceed by an originating summons in chambers. (n)

Since the Judicature Acts a creditor can, it is apprehended, sue both the surviving partners and the executors of the deceased partner, and obtain judgment against them all, the judgment against the executors being, however, of course limited to administration in due course unless assets are admitted. But to work out the judgment for administration, the action, if not brought in the chancery division, would have to be transferred to it.

**Right of creditors of firm compared with the rights of the separate creditors of the deceased.**—As will be seen hereafter, it is a rule in bankruptcy that the debts of a firm shall be paid out of the assets of the firm, and the separate debt of each partner out of his separate estate; and in administering the insolvent estate of a deceased partner

(i) *Re McRae*, 25 Ch. D. 16; *Re Hodgson*, 31 id. 177; *Re Barnard*, 32 id. 447; *Kendall v. Hamilton*, 4 App. Ca. 504, and 3 C. P. D. 403. Compare *Burn v. Burn*, 3 Ves. 573, where a bond creditor of the firm obtained a payment as if he had been a separate specialty creditor of the deceased, the bond being treated as joint and several.

(k) *Ibid.* See the decree in *Hills v. McRae*, 9 Ha. 297, and *infra*.

(l) *Cowell v. Sikes*, 2 Russ. 191;

*Gray v. Chiswell*, 9 Ves. 118. In the former there was a petition, but this is now unnecessary.

(m) *Hills v. McRae*, 9 Ha. 297, is an instance of a claim; but claims are now abolished.

(n) *Re Barnard*, 32 Ch. D. 447. As to the conduct of proceedings where there are two actions, one by a joint, and another by a separate creditor, see *Re McRae*, 25 Ch. D. 16.

\*the same rules have now to be adopted. (o)<sup>1</sup> Ac- [\*599]  
cordingly the separate estate of a deceased partner  
must be applied in payment of all principal and interest due  
to his separate creditors before any part of such estate can  
be touched by the creditors of the firm; (p)<sup>2</sup> and this rule

(o) Jud. Act, 1875, § 10. Even before, they were adopted to some extent. See *Lodge v. Prichard*, 1 De G. J. & Sm. 610. See below, p. 628, note (l).

<sup>1</sup> Partnership creditors cannot complain of the application of firm assets to the payment of individual debts of the members of the firm, unless it appears that there is not enough partnership property to satisfy both the creditors of the firm and of the individual members. *De Caussey v. Bailly*, 57 Tex. 665.

(p) See *Lodge v. Prichard*, 1 De G. J. & Sm. 610, and 4 Giff. 294; *Whittingstall v. Grover*, 10 W. R. 53; *Gray v. Chiswell*, 9 Ves. 118; *Addis v. Knight*, 2 Mer. 117; *Croft v. Pyke*, 3 P. W. 182. As to interest after the administration order, see *Ex parte Findlay*, 19 Ch. D. 334, and section 10 of the Jud. Act, 1875.

<sup>2</sup> Partnership creditors have a primary claim upon partnership assets to the exclusion of creditors of individual partners, until all the partnership debts are paid; and this rule excludes firm creditors from participation in assets of individual partners until their individual debts are paid. *Union Natl. Bank v. Bank of Commerce*, 94 Ill. 271; *Black's Appeal*, 44 Pa. St. 503; *Buchan v. Sumner*, 2 Barb. Ch. 165; *Hardy v. Mitchell*, 67 Ind. 485; *Filley v. Phelps*, 18 Conn. 294; *Conkling v. Washington Univer-*

sity, 2 Md. Ch. 497; *Bond v. Nave*, 62 Ind. 505; *Conant v. Frary*, 49 Ind. 530; *Rainey v. Nance*, 54 Ill. 29; *Bass v. Estill*, 50 Miss. 300; *Crooker v. Crooker*, 46 Me. 250; *Sniffer v. Sass*, 14 Rich. 20, n.; *Houseal's Appeal*, 45 Pa. St. 484; *Morrison v. Kurtz*, 15 Ill. 193; *Moline, etc. Manuf'g Co. v. Webster*, 26 Ill. 233; *Re Walker*, 6 U. Can. App. 169; *Moore v. Steel*, 67 Tex. 435; *Fox's Appeal*, 11 Atl. Rep. (Pa.) 228; *Bass v. Doering*, 11 West. Rep. (Ind.) 871; *Blankenship v. Wartelsky*, 6 So. West. Rep. (Tex.) 140; *Pahlmian v. Cranes*, id. 405; *Thornton v. Bussey*, 28 Ga. 302; *Tombs v. Hill*, id. 371; *Bevan v. Allee*, 3 Harr. 80; *Chase v. Steel*, 9 Cal. 64; *Collins v. Butler*, 14 Cal. 223; *Burpee v. Bunn*, 22 Cal. 194; *Wintersmith v. Pointer*, 2 Metc. (Ky.) 457; *North River Bank v. Stewart*, 4 Bradf. 254; *Ganson v. Lathrop*, 25 Barb. 455; *Kirby v. Carpenter*, 7 id. 373; *Smith v. Malory*, 24 Ala. 628; *Bridge v. McCullough*, 27 Ala. 661; *Van Wagner v. Chapman*, 29 Ala. 172; *Lucas v. Atwood*, 2 Stew. 378; *McCulloh v. Dashiell*, 1 Har. & G. 96; *Glenn v. Gill*, 2 Md. 1; *Foster v. Hall*, 4 Humph. 346; *Fleming v. Billings*, 9 Rich. Eq. 149; *Gadsden v. Carson*, id. 252; *Wilson v. McConnell*, id. 500; *Woddrop v. Ward*, 3 Desaus. 203; *Christian v. Ellis*, 1 Gratt. 396; *Pierce v. Jackson*, 6 Mass. 242; *Fish v. Herrick*, 6 id. 271; *Phillips v. Bridge*, 11 id. 242;

applies even although the surviving partners may be bankrupt. (g) If, indeed, there is not and never was, since the

- Goodwin v. Richardson, id. 469; Rice v. Austin, 17 id. 197; Adams v. Paige, 7 Pick. 542; Wilson v. Conine, 2 Johns. 280; Smith v. Baker, 10 Me. 458; Jarvis v. Brooks, 23 N. H. 136; Crockett v. Crain, 33 N. H. 542; Holton v. Holton, 40 N. H. 77; Treadwell v. Brown, 41 N. H. 12; Matleck v. James, 13 N. J. Eq. 126; Hill v. Beach, 12 id. 31; Wilder v. Keeler, 3 Paige, 167; Nicoll v. Mumford, 4 Johns. Ch. 522; Muir v. Leitch, 7 Barb. 341; Oakey v. Rabb, 1 Freem. (Miss.) Ch. 546; Arnold v. Hamer, id. 509; Terry v. Butler, 43 Barb. 395; Murrill v. Neill, 8 How. 414; *Re* Warren, Dav. 320; Hubble v. Perrin, 3 Ohio, 287; White v. Union Ins. Co. 1 N. & McC. 556; Washburn v. Bank of Bellows Falls, 19 Vt. 278; Willis v. Freeman, 35 Vt. 44; Converse v. McKee, 14 Tex. 20; Rider v. Gilbert, 16 Hun, 163; Taylor v. Farmer, 6 West. Rep. 710; Preston v. Colby, 6 West. Rep. 33; Succession of Pilcher, 1 So. Rep. 929; Gwynne v. Estes, 14 Lea (Tenn.), 662; *In re* Lloyd, 22 Fed. Rep. 90; Bowen v. Billings, 13 Neb. 439; Hardy v. Mitchell, 67 Ind. 485; Keese v. Coleman, 72 Ga. 658; Leach v. Milburn, 14 Neb. 106; Messer v. Messer, 59 N. H. 375; McArthur's Estate, 41 Leg. Int. 469; Tracy v. Walker, 1 Flip. C. C. 41; Smith v. Jones, 18 Neb. 481; McKenna's Estate, 11 Phila. 84; S. C. 32 Leg. Int. 218; Fullam v. Abrahams, 29 Kan. 725; Preston v. Colby, 117 Ill. 477; *In re* Adams, 29 Fed. Rep. 843; Level v. Farris, 24 Mo. App. 445; McCall v. Moschowitz, 10 N. Y. Civ. Proc. 107; Strauss v. Frederick, 91 N. C. 121; Lockwood v. Carr, 4 Dem. (N. Y.) 515; Warren v. Able, 91 Ind. 107; Warren v. Farmer, 100 Ind. 593; Charles v. Eshleman, 5 Colo. 107; *In re* Rieser, 19 Hun, 202; Roop v. Heron, 15 Neb. 73; Goodbar v. Cary, 16 Fed. Rep. 316; S. C. 4 Woods, 663; McIntire v. Yates, 104 Ill. 491; Bagwell v. Bagwell, 72 Ga. 92; Priest v. Chouteau, 85 Mo. 398; S. C. 12 Mo. App. 252; *Re* Estes, 3 Fed. Rep. 134; Evans v. Winston, 74 Ala. 349; Bennett's Estate, 13 Phila. 331; Gueringer v. Creditors, 33 La. Ann. 1279; Flanagan v. Shuck, 82 Ky. 617; Cowan v. Gill, 11 Lea (Tenn.), 674; Fowlkes v. Bowers, 11 Lea (Tenn. 144; Carter v. Galloway, 36 La. Ann. 473; Caldwell v. Bloomington Mfg. Co. 17 Neb. 489; Gordon's Estate, 11 Phila. 136; S. C. 33 Leg. Int. 202; Fayette Nat. Bk. v. Kinney, 79 Ky. 133; Gregory's Appeal, 15 Weekly Not. Cas. 525; S. C. 42 Leg. Int. 101; Bake v. Smiley, 84 Ind. 212; Doggett v. Dill, 108 Ill. 560; S. C. 48 Am. Rep. 565; Davis v. Howell, 33 N. J. Eq. 72; *In re* Hollister, 3 Fed. Rep. 452; Dill v. Voss, 94 Ind. 590; Ruth v. Lowry, 10 Neb. 260; Newmarket Nat. Bk. v. Locke, 89

(g) *Lodge v. Prichard*, and *Whittingstall v. Grover*, *ubi supra*. See, as to winding up of an estate of a deceased partner in bankruptcy,

where the surviving partners are bankrupt, *Ex parte Gordon*, 8 Ch. 555; *Morley v. White*, id. 214.



death of the deceased, any joint estate whatever, and no solvent partner, it seems that the joint creditors may rank

Ind. 428; *Fuller Electric Co. v. Lewis*, 101 N. Y. 674; *Clements v. Jessup*, 36 N. J. Eq. 569; *Swann v. Sanborn*, 4 Woods, 625; *R. R. Co. v. Bixby*, 55 Vt. 235; *S. C.* 57 id. 548; *Re Blumer*, 12 Fed. Rep. 489; *Stratton v. Tabb*, 8 Bradw. 225; *Stebbins v. Williard*, 53 Vt. 665; *National Bank v. Cushing*, 53 Vt. 320.

See, also, *Irley v. Graham*, 46 Miss. 425; *Whipple v. Hill*, 14 La. Ann. 437; *Bank of Kentucky v. Keizer*, 2 Duv. 169; *Whitehead v. Chadwell*, id. 432; *Bell v. Newman*, 5 Serg. & R. 78; *White v. Dougherty*, 1 Mart. & Yerg. 309; *Owens v. Davis*, 15 La. Ann. 22; *Grosvenor v. Austin*, 6 Ohio, 103; *Daniel v. Townsend*, 21 Ga. 155; *Scott v. Dunsley*, 12 Ala. 714; *Egery v. Howard*, 64 Me. 68; *Davis v. Grove*, 2 Robt. 134, 635; *Cunningham v. Gushee*, 73 Me. 417; *In re Duncan*, 10 Daly, 95; *Loeb v. Morton*, 79 Ala. 171; *Poole v. Seney*, 66 Ia. 502; *Pearce v. Cooke*, 13 R. I. 184.

The United States is entitled to priority of payment out of the partnership as well as the individual assets of partners over all creditors, whether partnership or individual. *In re Strassburger*, 4 Woods, 557.

The rule that partnership debts must first be paid out of partnership property, and private debts out of private property, only applies to personalty or real estate converted into personalty by making it partnership property. *Baker v. Finney*, 2 Pearson (Pa), 177.

This rule applies where one part-

ner mortgages his interest in the real estate of the firm to secure his individual debt; the interest thus mortgaged is subject to the prior lien for partnership debts. *Priest v. Chouteau*, 85 Mo. 398; *S. C.* 12 Mo. App. 252; *Stebbins v. Williard*, 53 Vt. 665.

Where a person does business under a firm name consisting of his own "& Co.," creditors dealing with him under his firm name can obtain no preference over creditors who have previously dealt with him under his individual name. All are entitled to an equal participation in his assets. *Miller v. His Creditors*, 37 La. Ann. 604.

Where the same partners carry on the same business at different places under different firm names there are not two distinct firms; and the assets of both nominal firms are equally applicable to the payment of all the creditors of both. *In re Williams*, 3 Woods, C. Ct. 493.

Where two of the members of a firm also sign their individual names to an obligation executed by the firm, and the firm and the individual members become insolvent and make assignments for the benefit of their creditors, the holder of the obligation has no greater rights than if the individual names of the members had not been signed to the note. *Fayette National Bank v. Kenney*, 79 Ky. 133.

In the distribution of a fund arising from the sale of property owned by and used and treated as belonging to the firm, but the title

*pari passu* with the separate creditors of the deceased against his separate estate. (r)<sup>1</sup>

to which is in one partner, wages of laborers and others employed by the firm are entitled to a preference over the claims of creditors of the individual partner who have loaned their money on the faith of his representations that the property belonged to him. Strickler's Appeal, 10 Weekly Not. Cas. 535.

A creditor of a dissolved partnership being non-resident of the state may proceed at once in equity in the United States circuit court to have the assets marshaled and distributed. Fiske v. Gould, 12 Fed. Rep. 372.

A bill to foreclose distinct mortgages to secure partnership and individual indebtedness is not a case for the marshaling of the assets. McIntire v. Yates, 104 Ill. 491.

For a decree marshaling the assets of a firm of six individuals upon claims against several of the partners, less than the whole firm, see Bertolet's Estate, 1 Woodw. D. (Pa.) 8.

The widow of a deceased partner is not entitled to draw anything from the partnership estate until all the firm debts are paid;

and this although the individual estate is inadequate to pay her widow's allowance. Julian v. Wrightsman, 73 Mo. 569. See Gurr v. Martin, 73 Ga. 529.

In an action for an accounting, where the assets are sufficient to pay the fees of the receiver, his counsel, and the referee, and a part only of the firm debts, an allowance should not be granted to defendant, notwithstanding he recovered a judgment against the plaintiff. Smith v. Green, 8 N. Y. Civ. Proc. 163.

A partner's private means are not open to inquiry in an action against the firm, which can only be liable for partnership purposes or for such as are presumably so. Roberts v. Pepple, 55 Mich. 367.

In cases of copartnership the equity in favor of separate creditors will not be enforced to control or take away a right acquired by legal execution on the part of joint creditors against the separate estate. It is only when the legal recourse of joint creditors against the separate estate is terminated, and they have no claim against these assets except in equity, as in cases of bankruptcy or death of a

(r) See Cowell v. Sikes, 2 Russ. 191, and Lodge v. Prichard, *ubi supra*. *Qu.* if the Jud. Act, § 10, has introduced the other exceptions recognized in bankruptcy cases of fraud and distinct trades. See *infra*, book iv, ch. 4, § 4. See below, note (l).

<sup>1</sup> If there is no joint fund nor any solvent partner joint credit-

ors may participate equally with a private creditor in the estate of individual partners. Pahlman v. Graves, 26 Ill. 405; *Re* Lloyd, 22 Fed. Rep. 88; Alexander v. Gorman, 11 East. Rep. (R. I.) 305; S. C. 7 Atl. Rep. 243; 3 New Eng. Rep. 385; Brock v. Bateman, 25 Ohio St. 609; Rogers v. Moranda, 7 id. 179. See *ante*, 599, note 2.

partner, that the joint creditors are postponed. The converse is also true. *Baker v. Wimpee*, 19 Ga. 87; *Cleghorn v. Ins. Bank*, 9 Ga. 319. See *Haskill v. Johnson*, 24 Ga. 625; *Allen v. Wells*, 22 Pick. 450; *Kuhne v. Law*, 14 Rich. 18. *Wisham v. Lippincott*, 9 N. J. L. 353; *Fullam v. Abrahams*, 29 Kan. 725; *Cunningham v. Gushee*, 73 Me. 417; *Bank of Toronto v. Hall*, 6 Ont. 653, reversing id. 644; *Louden v. Ball*, 93 Ind. 232; *Hyman v. Stadler*, 63 Miss. 362. See, also, *Preston v. Colby*, 117 Ill. 477; *Chalmers v. Turnipseed*, 21 S. C. 127.

However, where land of one partner is set off on execution for a debt of the firm, and afterwards the same land is set off for a separate debt of the partner, the separate creditor will hold the land. It has been so held in *Jarvis v. Brooks*, 23 N. H. 136; *Crockett v. Crain*, 33 id. 542; *Holton v. Holton*, 40 id. 77; *Treadwell v. Brown*, 41 id. 12.

Where a surviving partner organizes a new firm, in which he uses the assets of the old firm, the general creditors of the new firm have not, before levy of execution or attachment, any claim upon the property of the original firm or its avails as against those interested in the estate of the deceased partner. *Hookey v. Gieve*, 9 Abb. N. C. 8; *S. C. 9 Daly*, 104.

As a general rule, a partnership creditor cannot be compelled in equity by one of the partners or one of his separate creditors to proceed against the joint estate instead of the separate estate. *Wisham v. Lippincott*, 9 N. J. Eq. 353. For the converse of this rule, see

*Railroad Co. v. Bixby*, 55 Vt. 235; *S. C. 57 id.* 548; *McIntire v. Yates*, 104 Ill. 491.

The priority of lien of a judgment on a partnership debt, rendered after one partner had died, which lien attached to the real estate of the survivor, held in his individual right, will not be relieved against in equity, in favor of a subsequent judgment against the survivor for his individual debt, even though there be no assets to satisfy the latter judgment, and though the deceased partner had left sufficient assets to satisfy the partnership judgment. *Meech v. Allen*, 17 N. Y. 300.

The doctrine that the separate debt of one partner should not be paid out of the partnership estate until all the debts of the firm are discharged does not apply until the partners cease to have a legal right to dispose of their property as they please. It is applicable only when the principles of equity are brought to interfere in the distribution of the partnership property among the creditors. *McDonald v. Beach*, 2 Blackf. 55; *Schaeffer v. Fithian*, 17 Ind. 463; *Dunham v. Hanna*, 18 Ind. 270; *Goeder v. Cary*, 16 Fed. Rep. 316; *S. C. 4 Woods*, 663. See, also, *Golden State Iron Works v. Davidson*, 15 Pac. Rep. (Cal.) 20. See *Dean v. Phillips*, 17 Ind. 406; *Lowman v. Lowman*, 19 Bradw. 401.

The rule that the assets of a partnership are first to be applied to the firm debts, and that the separate creditors can proceed against the surplus only, is for the benefit and protection of partners, and if, upon dissolution, they waive that privilege by dividing the property

between them, and they mortgage it severally to secure their individual debts, creditors of the firm have no ground for complaint. *Poole v. Seney*, 66 Ia. 502.

Where a partner mortgages his private property to secure his firm debt, also secured by mortgage on firm property, he is surety for the partnership and is entitled to be subrogated to the rights of mortgagee; and the creditors of such surety are entitled to the same right of subrogation as the surety himself, the partnership property being a primary fund and the private property a collateral pledged to pay the debt. *National Bank of Royalton v. Cushing*, 53 Vt. 320. See, also, *Moffitt v. Roche*, 77 Ind. 48.

The rule that joint creditors are entitled to priority over separate creditors in the distribution of the joint estate is often held to apply only where there is such a joint estate for distribution. Where there is not such a joint estate, or where the firm, or both it and all its members, are insolvent, the creditor who first acquires a lien upon the property is entitled to the fund arising from the sale thereof in preference to subsequent creditors. *Scull's Appeal*, 19 Weekly Not. Cas. 70; S. C. 5 Cent. R. 869; 7 Atl. R. 588; *Sanquoit's Appeal*, 9 Atl. R. 77; *Ackroid's Appeal*, 9 Atl. R. 77; *Johnston's Appeal*, 9 Atl. R. 76; *D'Inviillers' Estate*, 13 Phila. 362; S. C. 8 Weekly Not. Cas. 455; *Fullam v. Abrahams*, 29 Kan. 725; *Schackelford v. Clark*, 78 Mo. 491.

See, also, *Hutzler v. Phillips*, 1 So. E. R. 502; *Buckingham v. Ludlam*, 37 N. J. Eq. 137; *Curtis v. Woodward*, 58 Wis. 499; S. C. 46 Am.

Rep. 647. See, however, *Warren v. Farmer*, 100 Ind. 593.

Thus, in Maine it has been held that a holder of a joint and several note by partners in the firm name, they being in insolvency as a firm and as individuals, may prove his note against the firm assets and also against the several estates of the partners, and may receive dividends from all the estates. *Ex parte Nason*, 70 Me. 363. See, also, *Wastbay v. Williams*, 5 Bradw. 521.

The provision of the statute of Maine of 1878, which, in case of insolvency of a partnership and its several members, appropriates the net assets of each estate to its own debts, the surplus of each to the creditors remaining, of the other, is applicable only when there is available joint estate and all the partners are insolvent. When there are no available net proceeds of the partnership assets and no solvent partner, the partnership creditors share the separate estate concurrently with the separate creditors. *Harris v. Peabody*, 73 Me. 262. See, also, *Pearce v. Cooke*, 13 R. I. 184.

In Texas it is held that an individual creditor has no superiority of claim against individual assets over a partnership creditor. *Cox v. Miller*, 54 Tex. 16. See, also, *Gueringen v. His Creditors*, 33 La. Ann. 1279.

In Louisiana, during the existence of a commercial partnership, it alone can be sued for a partnership debt, and the partners can be individually charged only through the firm. *Liverpool Navigation Co. v. Agar*, 4 Woods, 201; S. C. 48 Fed. Rep. 615.

In Kentucky it is held that where partnership creditors exhaust the

firm assets without being paid in full the individual creditors must receive a like sum from the individual assets; and when this is done the individual estate remaining will be distributed between all the creditors, partnership and individual, in proportion to the amount of their respective debt. *Fayette National Bank v. Kinney*, 79 Ky. 133.

Where a portion of the proceeds of a pledge or sale of partnership property is applied to the payment of partnership debts and a part to the payment of individual debts of the partner, in a controversy between the other partner and the pledgee or vendee, such pledgee or vendee is equitably entitled to set off against the partner's claim the amount of money which actually went to discharge partnership debts. *Liberty Savings Bank v. Campbell*, 75 Va. 534.

In Illinois a creditor has a right to proceed against the estate of a deceased partner at any time within the period of statute of limitations, and a failure to pursue partnership assets is no defense. *Eads v. Mason*, 16 Bradw. 545.

If a partner is indebted to the firm, or has taken more than his joint share of the joint funds, the joint creditors will not be admitted to prove against the separate estate of that partner until his separate creditors are satisfied, unless it be shown that he acted fraudulently with a view of benefiting his separate creditors. *Cowan v. Gill*, 11 Lea (Tenn.), 674.

If a partner has fraudulently converted property or money of a firm to his own use there seems to be no reason why proof on behalf of the joint estate should not

be allowed in respect of such property against his separate estate and in competition against his separate creditors. *In re Hamilton*, 1 Fed. Rep. 800.

General partnership creditors should be paid before advances by an individual partner out of his private property, although to pay firm debts. *Gordon's Estate*, 11 Phila. 136; S. C. 33 Leg. Intel. 202. See, also, *Bement's Estate*, 13 Phila. 331. See, however, *Re Cleverdon*, 4 U. C. App. 185; *Frank v. Anderson*, 13 Lea, 695.

One firm, partner with another firm, cannot, in competition with the creditors of the conjoint firm, prove a claim for the part payment of the partnership debts against a bankrupt member of the other firm, where such creditors had released such partnership from further obligation on express consideration that the individual liability of the bankrupt for the residue of such partnership debt should not be impaired. *In re Hamilton*, 1 Fed. Rep. 800.

Where three persons form a partnership and agree to bear the losses and share the profits in proportion to their contribution to its capital, and two partners furnish all the money and do all the work, they are entitled to be repaid their advances out of the assets before payment of the individual creditors of the partner who paid nothing and did nothing. *Hobbs v. McLean*, 117 U. S. 567.

If, after the dissolution of the firm, a deceased partner executed as an individual a note of the firm given in liquidation of a partnership debt, the holder is entitled to file it against the estate and par-

ticipate in the distribution of the individual assets. *Fowlkes v. Bowers*, 11 Lea (Tenn.), 144.

Under the insolvent act of 1885, section 80, and under the corresponding provision of the English act, a debt due by one partner of the firm to his copartner can properly be proved against the separate estate of the debtor as soon as the joint debts of the partnership have been discharged. *McIntosh v. Almon*, 6 N. S. (Rus. & Geld.) 498; S. C. 6 Can. L. T. 541. See, also, *Re Cleverdon*, *supra*.

The right of partnership creditors to claim a preference over the creditors of the individual members of the firm in the distribution of the partnership property is wholly dependent upon the right of the individual partners to enforce a lien upon the partnership funds for the payment of the partnership liabilities before individual debts; and if the contract of copartnership be of such a nature that the copartners can enforce no such right as between themselves, the partnership creditors can claim no such preference. *Rice v. Barnard*, 20 Vt. 479. See, also, *Schmidlapp v. Currie*, 55 Miss. 592; *Waterman v. Hunt*, 2 R. I. 298; *Couchman v. Maupin*, 78 Ky. 33; *Saunders v. Reilly*, 105 N. Y. 12; reversing S. C. 34 Hun, 457; *Hanover Nat. Bk. v. Klein*, 64 Miss. 141.

Where a partnership can resist a wrongful application of its assets its creditors can do so. *Carter v. Galloway*, 36 La. Ann. 473.

Ordinarily a partnership estate is liable to the payment of the debts of the firm in preference to the individual debts of the partners. This is the right of the part-

ners *inter se*. The creditors of the partnership have no such right of priority over the creditors of the partners individually, but only by substitution to the rights of the partners *inter se*. The partners may release this right, and the creditors of the copartnership cannot complain, for it is not their right, except subject to the disposition and control of the partners themselves, to whom it belongs. *Shackleford v. Shackleford*, 32 Grat. 481; *Schmidlapp v. Currie*; *Waterman v. Hunt*, *supra*.

Where one partner, in good faith, assigned all his interest to the other, who in turn made a *bona fide* assignment for the payment of debts, giving some of his separate debts a preference, *held*, that the partnership creditors could not sustain a bill for satisfaction of their debts out of the assigned property until executions at law for those debts had been issued and returned unsatisfied. *Robb v. Stevens*, 1 Clark (N. Y.), 191.

A bill in equity may be maintained by a creditor of the firm against the personal representatives of the partners of a firm, all of whose members have died, leaving assets in the possession of their individual representatives, to have the assets marshaled and distributed to the creditors entitled to them; and in such case it is not necessary that judgment be first obtained at law. *Fisk v. Hills*, 11 Biss. 294.

Partners have the power, while the partnership assets remain under their control, to appropriate any portion of them to pay or secure their individual debts. A mortgage given by them to secure

individual debts fairly due is not rendered void by the mere fact that it operates to give individual debts a preference over demands against the firm; nor will such mortgage be set aside for that reason by a court of equity, unless, perhaps, when created in contemplation of insolvency, to give an improper preference. *National Bank of Metropolis v. Sprague*, 20 N. J. Eq. 13.

An insolvent firm cannot, however, by voluntarily assuming the individual debt of one of its members, and giving to the creditor of such partner a judgment note for the amount of such debt, prefer such creditor to the firm creditors. It may do so, however, if there is a moral obligation on its part to pay the debt of the individual member. *Walker v. Marine National Bank*, 98 Pa. St. 574; S. C. 11 Weekly Not. Cas. 142.

Where, after the failure of a firm, and while they are endeavoring to settle with their creditors, one partner, at the request of a holder of a firm obligation, guaranties its payment, such guaranty is without legal effect, and does not entitle the holder to prove against the separate estate of the guarantor upon his subsequent adjudication of bankruptcy. *In re Blumer*, 13 Fed. Rep. 622.

One partner cannot, after making a general assignment for the benefit of creditors, prejudice the right of firm creditors by increasing the liabilities of the firm. *Payne v. Smith*, 28 Hun (N. Y.), 104.

C. owned all the property by which a business was carried on, but with his knowledge two other

persons not in fact his partners held themselves out as such. *Held*, that these representations did not divest C. of his exclusive title to the property, and his individual creditors were entitled to have it applied first to the payment of their debts. *Swann v. Sanborn*, 4 Woods, C. Ct. 625. See, also, *Taylor v. Wilson*, 58 N. H. 465.

The partnership, while it is solvent, may sell its property or give its note, secured by mortgage, to one of the partners, and if the sale be made, or the note and mortgage given in good faith and for valuable consideration, they will be valid against the claims of the partnership creditors; and although, if such note and mortgage be retained by the partner until the bankruptcy of the firm, he will not be allowed to enforce them against the company assets to the exclusion of the partnership creditors, because he is himself liable to these creditors, yet the assignee of such note and mortgage, who has received them in good faith and for valuable consideration during the solvency of the firm, holds them unaffected by the claims of the partnership creditors. *Waterman v. Hunt*, 2 R. I. 298. See *ante*.

Where the trustee under a deed of trust made by the surviving partners after the dissolution of an insolvent firm by the death of a member had appropriated money of the firm, realized by him before the service of an attachment in a suit in which the deed was declared unauthorized, to the payment of his own and other preferred debts, in violation of the right of partnership creditors to be paid be-

fore creditors of individual partners, and to share ratably, *held*, that the payments could not be allowed to stand. *Barcroft v. Snodgrass*, 1 Coldw. 430.

At a time when a debtor was allowed to give preferences, one who was a member of an insolvent partnership conveyed his separate real property in satisfaction of his debt to a separate creditor. Its value exceeded the debt. *Held*, that the firm creditors had an interest in the excess, and that, in equity, the property conveyed would be held as a security first for the debt due to the grantee, and, as to the excess of value, for other debts. But the real estate conveyed being the separate property of the copartner, the excess of value was bound first for his separate debts, and only after satisfying these was it applicable to the debts of the partnership. *Bailey v. Kennedy*, 2 Del. Ch. 12.

An assignment by copartners of their individual property, as well as their partnership property, to pay the joint debts of the firm, is not on that account void. *Van Rossum v. Walker*, 11 Barb. 237.

A transfer of the interest of a partner of an insolvent firm to his copartner does not enable the assignee as against the firm creditors to apply the partnership property to the payment of his individual debts. *Roop v. Herron*, 15 Neb. 73; *Crane v. Roosa*, 40 Hun, 455.

A preference of debts of the individual partners, in an assignment by a firm, is fraudulent, and renders the whole assignment void as to those firm creditors who repudiate it. *Vernon v. Upson*, 60 Wis. 418.

Only copartnership creditors, suing as such, can raise the objection that provision is made in the assignment for the payment of individual debts out of the firm assets. *Haynes v. Brooks*, 17 Abb. N. C. 152; S. C. 8 N. Y. Civ. Proc. 106.

On the dissolution of a partnership between L. and W. the latter transferred all his interest to L., who subsequently became insolvent, and assigned all his estate, including the partnership assets, to the defendant in trust to pay "the claims of his creditors ratably and proportionately, and without preference or priority, recognizing such liens, claims, charges and priorities as the law directs." *Held*, reversing S. C. 5 Ont. 104, and 4 Can. L. T. 87, that under the terms of the deed there was no priority between the separate creditors of L. and the joint creditors of L. and W., all being creditors of L., and that both were entitled to be paid *pari passu*. *Moorehouse v. Bostwick*, 11 U. C. App. 76; S. C. 5 Can. L. T. 278; 21 Can. L. J. (N. S.) 218; 5 Ont. 104; 4 Can. L. T. 87.

The members of an insolvent partnership assigned their partnership property, together with certain real estate, which they owned as tenants in common, in trust for the payment of their partnership debts, with a reservation to themselves of the surplus, if there should be any. *Held*, that the assignment was void as to individual creditors of the assignors on account of this reservation. *Collomb v. Caldwell*, 16 N. Y. 484. See *ante*, *Assignments*.

Equity will not sustain an agreement made by partners for the



purpose of giving the separate creditors of one partner a preference to the creditors of the firm, if the firm be, at the time of making such agreement, insolvent. *Collins v. Hood*, 4 McLean, 186.

One partner has no right to assign to his separate creditors any portion of the effects of the partnership to the prejudice of the partnership creditors. *Black v. Bush*, 7 B. Mon. 210. See *ante*, *Assignments*.

A creditor of one of several partners has no right, even under an express contract with such partner, to apply partnership effects to the satisfaction of a debt against such partner, unless the other partner consents to the contract. *Broadbuss v. Evans*, 63 N. C. 633.

A partner sold his interest in the firm to his copartner, who agreed to pay the firm debts. The firm was at the time insolvent. After the sale, continuing partner gave a deed of trust on all the assets of the late firm to secure the payment of an individual indebtedness of his own which accrued prior to the dissolution. In a contest between a creditor of the firm and the individual creditor, *held*, that the right of the former to be paid out of the firm assets in preference to the latter was not impaired by the dissolution, and as against him the deed of trust was a nullity. *Phelps v. McNeely*, 66 Mo. 554.

In *Jones v. Lusk*, 2 Metc. (Ky.) 356, it was held that the only insolvency which will give the chancellor jurisdiction to decree priority of payment in favor of partnership debts is that which is ascertained and established by a judgment, execution and return of

"no property" against one or more of the partners. In *Levy v. Ley*, 6 Abb. Pr. 89; S. C. 15 How. Pr. 395, it was held that proof that the defendants have suspended payment on their liabilities, and pay nothing in full except such small claims as would be pressed to judgment if not settled, and which are paid to prevent the assets from being sacrificed, is sufficient proof of insolvency to authorize an injunction and appointment of a receiver in an action by a creditor of a partnership on an indebtedness of the firm.

Where a partnership is insolvent, or where its solvency is doubtful, a court of equity will restrain a sale and the taking of possession of the partnership property under an execution against an individual member of the firm until the settlement of the partnership affairs, in order to ascertain whether the debtor partner has a real and valuable interest over and above the liabilities of the firm. *Hubbard v. Curtis*, 8 Iowa, 1.

Property attached in a suit against a partnership, *prima facie*, in the absence of contrary showing, will be presumed to be partnership property; and before individual property can be afterward taken it behooves plaintiff to show that this first has been exhausted, or that, for some good reason, it was exempt. *Lewis v. Conrad*, 11 Iowa, 153.

Where a firm has become insolvent and an application has been made for receivers, a special partner in the insolvent firm is entitled to come in and claim as a creditor of the partnership, and to receive a dividend out of the assets *pro*

*rata* with the other creditors. *White v. Hackett*, 24 Barb. 290.

A partner mortgaged his private property for a firm debt, and on that mortgage the property was sold and the debt satisfied after the firm assets had gone into the hands of an assignee for creditors. *Held*, that the separate estate of the partner stood on the same footing as other general creditors of the firm. *Kendall v. Rider*, 35 Barb. 100.

Where a surviving partner has paid the partnership debts of a losing concern he is entitled to be substituted for the amount that the estate of the deceased partner is indebted to him on that account to the rights of the creditors of the firm whose debts he has paid. *Morris v. Morris*, 4 Gratt. 293.

Where a person becomes a member of a firm, purchasing an interest in a mill and the ground upon which it stands, and there is a prior incumbrance by mortgage upon the premises, which the former owners agreed to remove, and also a mechanic's lien, of which the purchasing partner had no notice, the real estate becomes partnership property, and upon an adjustment of the rights of the partners and partnership creditors, and creditors of individual partners, the purchasing partner, as against the separate creditors of the partners, will be considered a creditor of the firm, and as such entitled to be reimbursed out of the joint fund, to the exclusion of such separate creditors, to the extent of those prior liens which had been satisfied on a sale of the firm property. *Rainey v. Hance*, 54 Ill. 29.

Where, in a suit against two

partners for a partnership debt, one of them is discharged upon his plea of infancy, and judgment is taken against the adult partner, the judgment is still a partnership debt, to which the partnership funds must be applied in preference to debts of the individual partners. *Gay v. Johnson*, 32 N. H. 167.

Sureties on a bond given to dissolve an attachment in a suit against partners can recover from the firm the amount paid by them on such bond, although the judgment was recovered against one partner only, the suit having been discontinued against the others for want of jurisdiction. *Inbusch v. Farwell*, 1 Black, 566.

In the United States courts partnership property may be held for partnership debt, though judgment can be obtained only against one partner by reason of the other's being out of the jurisdiction. *Inbusch v. Farwell*, 1 Black, 566.

Where the same partners carry on the same business at different places under different partnership names, there are not two distinct firms, and the assets of both nominal firms are equally applicable to the payment of all the creditors of both. *In re Williams*, 3 Woods, 493.

B. and C. were partners under the firm name of B. & C., and also copartners with A. under the firm name of A., B. & C. The demandant, a partnership creditor of the firm of A., B. & C., having attached and levied on the real estate of B. & C., purchased by them with partnership funds and for their partnership use, but held by them as tenants in common, the same was subsequently attached and

levied on by the tenant, who was a creditor of the firm of B. & C., as their partnership property, and the demandant brought his writ of entry to recover the same. *Held*, that the demandant by his previous attachment and levy acquired the better title at law to the premises, and was entitled to judgment, but judgment was withheld to await the result of a suit in equity then pending to subject the land to the partnership debts of B. & C. *Peck v. Fisher*, 7 Cush. 387.

The legal priority obtained against a firm composed of two partners by a partnership creditor of a firm, consisting of the same individuals joined with a third, will be postponed in equity to the claims of the partnership creditors of the former. *Shedd v. Wilson*, 27 Vt. 478.

Where a person is a member of two partnerships his separate creditors have a preference over his interest in the property of one of the firms as against creditors of the other firm. *Weaver v. Weaver*, 46 N. H. 188.

Where a partnership is changed by the admission of a new partner the creditors of both the old and new firms will in equity be allowed to share alike in the partnership property. *Shedd v. Bank of Brattleboro'*, 32 Vt. 709.

A. and B., partners, gave a joint and several bond and warrant of attorney to T. for a partnership debt. Judgment was entered and execution issued February 7, 1876. February 20 A. and B. made an insolvent assignment, B. being also individually insolvent. The judgment being only partly satisfied, and A. having made an assign-

ment, it was held that T. might, under A.'s assignment, share equally the personal effects of A., and was not to be subordinated to his individual creditors. *Howell v. Teel*, 29 N. J. Eq. 490.

On the 1st day of June, 1842, A., B. and C. entered into a partnership in the business of keeping a livery-stable, and, as such partners, purchased of D. property necessary for conducting such business to the amount of \$8,200, for which they gave their joint and several promissory notes, payable on the 1st day of February in the years 1843, 1844, 1845 and 1846, respectively. In August, 1842, C. died, and the business of the partnership was continued by A. and B., with the partnership capital, without any adjustment of the partnership concerns, until May, 1844, during which time they paid from the partnership funds two of the notes to D., amounting to \$4,200, the other two being still unpaid. At the time of C.'s death the partnership property was sufficient to pay the partnership debts, but the business was afterwards ruinous. A., being appointed administrator of C., sold in May, 1844, by order of the court of probate, and with the consent of C.'s heirs, one undivided third part of the partnership property then remaining to E. for the use and benefit of A.; and A. thereupon assumed the payment of that portion of the notes to D. which it belonged to C. in his life-time to pay. On the 19th of June following A. settled his administration account, charging C.'s estate with \$3,002 on account of the notes given to D., and crediting the estate with \$2,094 for the avails of the

partnership property belonging to it, thus showing a loss resulting to it from the partnership concern of \$908. After the death of C. new partnership debts were contracted, which are still unsatisfied. Some of these creditors brought suits on their respective claims against A. alone, attaching his interest in the partnership property, which suits are still pending. In April, 1844, A. executed a mortgage of all his interest in the partnership property to certain other creditors to secure debts against him individually. A. is entirely insolvent, and B. has no estate, except his interest in the partnership property. On a bill in chancery brought by the heirs of C. against A. and B. and the attaching creditors and mortgagees of A. it was *held*:

1. That the notes given by A., B. and C. to D., notwithstanding their form, constituted a partnership debt.

2. That although the notes given to D. were, in form, several as well as joint, so that D. could sustain an action at law thereon against C.'s administrator, without resorting to A. and B. as surviving partners, yet this did not vary the equitable rights of those interested in C.'s estate, nor prevent the interposition of a court of chancery to apply the partnership effects in payment of the debt.

3. That the rights of those interested in C.'s estate were not impaired by delay in closing the partnership concerns.

4. That they were not impaired in consequence of the sale to A. through the agency of E.; for whether A. could, under the circumstances, be both seller and pur-

chaser or not, yet he received the property subject to the incumbrance of the notes to D., and it was still liable for the payment of those notes.

5. That the creditors of the partnership whose debts were contracted after the death of C. were entitled to share in the partnership effects.

6. That those creditors who had brought suits against A. alone and attached his interest in the partnership property, which suits were still pending, were also entitled to share in the partnership effects.

7. That the mortgagees and other creditors of A. individually could take nothing except his share in the partnership property remaining after payment of the partnership debts. *Filley v. Phelps*, 18 Conn. 294.

A person who has advanced money to one of several partners, upon his indorsement of a note made by another partner, cannot come into a court of chancery for payment of the note out of the partnership effects, though the proceeds of the note were applied to partnership purposes. *Coster v. Clarke*, 3 Edw. Ch. 411.

The excess of one partner's advance over those of another constitutes a preferred claim upon the partnership property or its proceeds against the individual creditors of the bankrupt partner. *Conkling v. Washington University*, 2 Md. Ch. 497. See, also, *Buchan v. Sumner*, 2 Barb. Ch. 165.

A judgment confessed by one partner in favor of his copartner, to secure him for capital advanced to the concern, is valid against the judgment of the private creditor

of the partner who confessed the judgment. *Purdy v. Lacock*, 6 Pa. St. 490.

A. and B. were partners. A. owed the firm \$17,600. He died. The surviving partner assigned the firm assets to an assignee for the benefit of creditors. The assignee claimed of A.'s administrator that out of A.'s individual assets he should pay to the assignee the \$17,600 which A. owed the firm. The individual creditors of A. resisted this claim, on the ground that it was substantially a claim by the firm creditors to come in upon A.'s separate estate, notwithstanding the existence of a fund of their own; an objection which the trial court thought valid, and disallowed the claim. The appellate court reversed the decision and allowed the claim, holding that "the debt of a partner to his firm for partnership effects withdrawn and appropriated to his separate use" was not "a partnership debt," but an individual debt, and that he was "just as much a debtor severally for what the firm has advanced to him as he would be to another creditor," and this notwithstanding "when his debt is paid it will go into the firm and form a part of its assets, and the firm creditors will then come in upon it as part of their fund." A partnership debt is a debt which a partnership owes to its creditors, not that which another owes to it, whether its debtor is one of the partners themselves or some one else. *McCormick's Appeal*, 55 Pa. St. 252. See, also, *Busby v. Chénault*, 13 B. Mon. 554; *Payne v. Matthews*, 6 Paige, 19.

A., B. and C. were partners. B.

sold the partnership property, took notes, and received some money thereon from the purchasers. He gave A. and C. his own notes for their shares, with the understanding that a settlement should take place when all the other notes were collected, each partner bearing his proportion of the loss from bad debts, if any. On a bill by A. against B.'s executor, *held*, that A. was entitled to his share of the money received or to be collected on the notes given for the partnership property by the purchaser in preference to the private creditors of B. *Ridgely v. Carey*, 4 Har. & M. 167. See, also, *Christian v. Ellis*, 1 Gratt. 396.

A. held a contract upon which certain money was to be received for the benefit of B. and C., who were partners. B. and C. ordered the money, when received, to be paid over to D., to whom the partnership was indebted; and B., surviving partner, after the death of C., made a formal assignment of the money to D., to be appropriated to the payment of his demand against the partnership. After this A. received the money, at different times, and paid it over to D. Meanwhile E. summoned A. and D. as trustees of B. and C. *Held*, that D. was entitled to so much of the money as would satisfy his demands against the partnership, but that he was not entitled to retain for the private debt of B., the surviving partner, nor for the debts of other creditors of B. and C., to whom, without any authority, he had said that, if there was any balance in his hands, he would pay the debts. *French v. Lovejoy*, 12 N. H. 458.

Where an individual member of a firm deposits with a creditor of the firm a promissory note belonging to such partner, as collateral security for a particular debt owing by the firm to such creditor and afterwards pay the debt, the party so depositing the collateral can recover the proceeds collected by the creditor, notwithstanding there may remain other unadjusted claims due from the firm to such creditor, the firm being solvent at the time, on the ground of the separate property of one partner not being liable to be taken in the first instance to satisfy partnership debts. *Adams v. Sturges*, 55 Ill. 468.

A firm to secure creditors agreed to transfer certain coal barges, mules, etc., to them and execute a bill of sale, the creditors agreeing at the same time to take the real estate of one of the firm and pay the liens thereon, which were for his individual debts; deeds for the property were made, but the creditors did not pay the liens, and in an action in the name of the individual partner against the creditors on their agreement to take his property and pay the liens, the defendants claimed that it and the bill of sale were one transaction, and that they were entitled to default against the amount to be recovered against them, damages for breach of the partnership contract in not turning over to them the property sold, to which they covenanted that they had a good title. *Held*, defense not valid, its effect being to divert to the creditors of the partnership a fund arising from private property specifically appropriated to private

debts. *Jackson v. Clymer*, 43 Pa. St. 79.

The ratification by the firm of the unauthorized act of one partner in signing the firm name to a contract of suretyship is ineffectual as against existing partnership debts, being in substance an adoption by the firm of the private debt of one partner. *Kidder v. Page*, 48 N. H. 380.

Where one partner retires from a firm and releases all his interest in the assets to the other partner, who agrees to pay all the company debts, the right of priority still continues in the partnership creditors in respect to such assets. *Caldwell v. Scott*, 54 N. H. 414; *Succession of Beer*, 12 La. Ann. 698; *Wilson v. Soper*, 13 B. Mon. 411.

Upon the dissolution of a partnership between A. and B., A. assumed the payment of the partnership debts. *Held*, that a partnership creditor could not proceed for the appointment of a receiver of B.'s property only, without showing some sufficient reason for not proceeding against the property of the partnership and of A. *Henry v. Henry*, 10 Paige, 314.

The property of the partnership remains subject to the preference of the partnership creditors, notwithstanding the survivor may have managed and treated it as his own, with the assent of the administrator of the deceased partner, and may have contracted debts upon the credit of the property. *Benson v. Ela*, 35 N. H. 402. See, however, *Topliff v. Vail*, Harr. Ch. 340.

Where land was purchased by a partnership, but not used by them in their business, and it afterwards

was sold under execution against one of the partners, and it did not appear that the purchaser had notice that it was partnership property, *held*, that the land so purchased was not to be made liable in his hands for partnership debts. *Buck v. Winn*, 11 B. Mon. 320.

If two persons who are not in fact partners hold themselves out to certain creditors as partners of a stock in trade, so as to become liable to them as such, although the stock belongs exclusively to one, the rights of these creditors would rest upon estoppel, which would be personal to the parties bound or their privies, not upon a lien on or equity in the stock to be worked out through the parties; and therefore, in a controversy between such creditors and a purchaser of the stock at execution sale under a judgment against the actual owner of the goods as the sole proprietor, the purchaser would have the better right. *Hillman v. Moore*, 3 Tenn. Ch. 454. See, also, *Allen v. Dunn*, 15 Me. 292. See, also, *ante*, this note.

A., with the consent of B., did business in his name, and bought goods of C. and also of D., who both gave credit to B. C. brought an action against B. and attached goods as his property. Subsequently D. brought an action against A., doing business under the name of B., and attached the same goods. C. was then allowed, without notice to D., to amend his writ by adding the name of A. as a defendant and declaring against A. and B. as copartners doing business under the name of B. Both C. and D. recovered judgments. As between A. and B. the latter

had no interest in the attached goods. *Held*, that the goods attached were first to be applied in satisfaction of the execution obtained by C. on his judgment; and that the amendment was immaterial. *Wright v. Herrick*, 125 Mass. 154. See, also, *S. C.* 128 Mass. 240.

The creditors of a partnership consisting of A. and B., who were mostly ignorant of the partnership and dealt with A. alone, after the partnership goods had been attached by C. to secure a debt in his favor against A. individually, with a view to save expenses, consolidated their debts and took a note to D. for the amount, it being agreed, between them and B., that he should not be called upon beyond the value of the partnership goods. D., in a suit on such note, afterwards attached the same goods. A. and the partnership were insolvent and had no other property than the goods attached, which were of less value than the amount of the note to D. On a bill in chancery, brought by D. against C., claiming priority of lien, it was *held* (1) that the agreement between the partnership creditors and B. was a fair and proper one as between them, and that neither C. nor A. could complain of it; (2) that D. was entitled to the priority claimed; (3) that the only adequate remedy was in chancery, where all the parties interested might be brought together and their several rights determined. *Witter v. Richards*, 10 Conn. 37.

Where a debtor partner, by his will, has subjected his real estate to the payment of his debts, his partnership creditors are entitled

to share with the separate creditors in that fund. *Morris v. Morris*, 4 Gratt. 293.

Partnership property is first to be applied to the payment of partnership debts, but a partnership creditor may, with the assent of the firm, waive this privilege and agree to share *pro rata* with the creditor of the individual partner. *Linford v. Linford*, 29 N. J. L. 113.

The rule that the creditors of a partnership will not be permitted to reach the individual estate of a deceased partner until all the separate creditors are satisfied applies only to cases founded on the relation of debtor and creditor, and cannot interfere with the remedy against an individual as a wrongdoer, or his estate. *Morgan v. Skidmore*, 55 Barb. 263.

The rule that partnership property must be first applied to the payment of partnership debts does not apply in the case of a silent partner; in such case the partnership property may be taken for private debts of the ostensible partner, although there be partnership debts unpaid. *Cammack v. Johnson*, 2 N. J. Eq. 163. See, also, *French v. Chase*, 6 Me. 166.

In the case of a dormant partnership, an attachment of the stock in trade in the hands of the ostensible partner, in a suit against him alone, has preference to a subsequent attachment of the same goods by another person in an action against the partners. *Lord v. Baldwin*, 6 Pick. 348.

Where a surviving dormant partner was a creditor of the firm for advances and profits, and where the deceased partner had promised

to pay the same, *held*, that he might have a remedy by filing his claim with the commissioners of insolvency upon the estate of the deceased, and that they might allow it, postponing payment until the creditors had been paid in full. *Johnson v. Ames*, 11 Pick. 173.

The doctrine that a separate debt of one partner shall not be paid out of the partnership property till all the partnership debts are paid is, it is said, applicable only where the principles of equity are brought to interfere in the distribution of the partnership property among the creditors. *Mittnacht v. Smith*, 17 N. J. Eq. 259. See, also, *Gillaspy v. Peck*, 46 Iowa, 461.

The *quasi-lien* of the creditors of a partnership on its property, as against creditors of individual members of the partnership, gives equity jurisdiction for the purpose of protecting the members of the partnership. *Blackwell v. Rankin*, 7 N. J. Eq. 152.

The preference which the law gives the creditors of a partnership to be first satisfied out of the firm property will, however, be protected in proceedings of garnishment by firms and individual creditors. *Switzer v. Smith*, 35 Iowa, 269.

Where one partner, without the knowledge or consent of his co-partner, pays his own note to a private creditor out of the funds of the insolvent firm, such creditor knowing that the money belonged to the firm, the funds so received will be regarded as held by the private creditor in trust for the benefit of the firm, and may be attached in his hands upon a trustee process instituted against the firm



Again, the rule which in bankruptcy precludes one partner from proving against the separate estate of his copartner

by one of its creditors. *Johnson v. Hersey*, 70 Me. 74; S. C. 8 Am. Law Record, 720; 73 Me. 291.

The rule applies where a court of equity is asked to set aside a fraudulent conveyance of real estate. *Hardy v. Mitchell*, 67 Ind. 485. See *Loving v. Paired*, 10 Iowa, 282.

The fact that an individual creditor foregoes his right to have a fraudulent conveyance of the real estate of such partner set aside gives a partnership creditor no right to attack such conveyance. *Hardy v. Mitchell*, 67 Ind. 485. The only interest of the partnership creditor in such case is in the residue of the individual property over individual debts. *Hardy v. Mitchell*, *supra*.

In a complaint by a partnership creditor, attacking an alleged fraudulent conveyance of the individual real estate of the partner, it would be proper to aver that there were no individual debts. *Hardy v. Mitchell*, *supra*.

An action attacking such conveyance might be brought jointly by partnership and individual creditors. *Hardy v. Mitchell*, *supra*.

The administrator of a surviving partner represents the partnership assets as well as the individual estate of his intestate. Accordingly it is held that a partnership creditor being in time to recover against the estate of the surviving partner, in which event that estate would be entitled to proper reimbursement from the partnership fund, it is therefore proper to reach the same result without circuitry by allowing the creditor to resort to

the partnership fund directly. *Brooks v. Brooks*, 12 Heisk. 12.

Where the partnership property is not sufficient to pay the debts of the firm the priority of the United States does not reach the undivided interest of one of the partners in the partnership effects, if he is indebted to the United States, but when it has become his separate, individual property the rule is different. The true test is whether the property belongs to the partnership or to the individual. *United States v. Duncan*, 12 Ill. 523.

The creditors of a partnership applied to a state court by bill to declare the partnership and decree the payment of the partnership debts out of assets in the hands of the administrators of one of the partners who had died insolvent, indebted to the United States. The administrator denied the partnership and took an objection based on the debts being due the United States and its priority. The United States were not parties and did not appear in the state court. The state court decreed in accordance with the prayer of the bill. *Held*, that the proceedings in the state court did not impair the rights of the United States, and that it was not bound by them; but that, notwithstanding the decree in the state court, the priority of the government attached, and that whenever the proceeds of any real estate or personal estate came into the hands of the administrator he became a trustee for the United States, which must first be paid. *United States v. Duncan*, 12 Ill. 523.

ner, whilst the joint debts are unpaid, also applies in administering the estate of a deceased partner. (s)

**Share in firm not available for separate creditors till joint creditors are paid.**—The separate estate thus primarily liable to the separate creditors of the deceased does not include his share in the partnership assets; for he has no share in those assets, except subject to the payment of the debts of the firm. Whilst, therefore, the separate creditors of the deceased are entitled to be first paid out of his separate estate, the creditors of the firm are entitled to be first paid out of its assets, and, consequently, to be paid in full before the share of the deceased in those assets becomes available for the payment of his separate creditors. (t)<sup>1</sup>

(s) *Lacey v. Hill*, 8 Ch. 441. Compare *Ex parte Topping*, 4 De G. J. & Sm. 551.

(t) See *Ridgway v. Clare*, 19 Beav. 111; *Hills v. McRae*, 9 Ha. 297.

<sup>1</sup> All the debts due from the joint fund must first be discharged before any partner can appropriate any part of it to his own use or pay any of his private debts; and a creditor of one of the partners cannot claim any interest but what belongs to his debtor, whether his claim be founded on any contract made with his debtor or on a seizure of the goods on execution or attachment. *Pierce v. Jackson*, 6 Mass. 242; *Fish v. Herrick*, id. 271; *Phillips v. Bridge*, 11 id. 242; *Goodwin v. Richardson*, id. 469; *Rice v. Austin*, 17 id. 197; *Adams v. Paige*, 7 Pick. 542; *Wilson v. Conine*, 2 John. 280; *Smith v. Baker*, 10 Me. 458; *Menagh v. Whitwell*, 52 N. Y. 147; *Cox v. Russell*, 44 Iowa, 556; *Williams v. Gage*, 49 Miss. 777; *Faler v. Jordan*, 44 id. 283; *Irby v. Graham*, 46 id. 425. See *Fenton v.*

*Folger*, 21 Wend. 676; *Stevens v. Bank of Central N. Y.* 31 Barb. 590; *Reed v. Shephardson*, 2 Vt. 120; *Gillaspy v. Peck*, 46 Iowa, 461.

The mere insolvency of a copartnership is sufficient to defeat an attachment made by a creditor of one of the firm, although the partnership creditors have commenced no action for the recovery of their debts. Therefore, where an officer had attached the partnership effects in a suit against one of the partners, and afterwards, with the consent of the firm, which was insolvent, suffered the effects to be applied to pay a partnership debt due to a stranger, it was held that he was not responsible to the first attaching creditor in an action for not having seized the goods in execution. *Bank v. Wilkins*, 9 Me. 28.

The joint sale of partnership property on separate executions against the individual partners leaves their interests as they were. Where one was more in advance of the other than the whole proceeds, partnership executions are

**Action by joint creditors.**—Actions by creditors of the firm to obtain payment out of the \*assets of [\*600] a deceased partner are well illustrated by *Brett v. Beckwith*. (*u*) In that case there had been two partners, Young and Beckwith. Beckwith was dead, and Young was bankrupt. A bill was filed by the creditor of the late

to be first satisfied, and then the separate execution creditors of such partner, in exclusion of the other partner and his separate execution creditors. *Cooper's Appeal*, 26 Pa. St. 262. See, also, *Vandike's Appeal*, 57 Penn. St. 9.

An individual creditor attached firm property; a firm creditor thereupon attached the same property. *Held*, that in order to obtain the precedence to which the firm creditor had a right, and to oust the first attachment, it must appear by a bill in equity, or in some way, that all the firm property was needed to pay the firm debts. *Scudder v. Delashmut*, 7 Iowa, 39.

The court will not, by injunction, restrain the sale of the interest of one partner in copartnership property under a judgment and execution against such partner for a debt due from him individually, where there are no averments in the complaint to show that the debtor in the execution has not some interest in the property levied on after the satisfaction of the partnership debts, and after deducting the interest of the solvent partners from the partnership estate. *Mowbray v. Lawrence*, 13 Abb. Pr. 317; 22 How. Pr. 107. See, also, *Moody v. Payne*, 2 John. Ch. 548.

One partner, who has sold out

his interest to his copartner, retaining by agreement a lien upon the property for his indemnity, may obtain an injunction to prevent a private creditor of the vendee partner from selling on execution before an account had been taken, and the interest of the vendee partner in the property thereby ascertained. *White v. Parish*, 20 Tex. 688; *Rogers v. Nichols*, id. 719.

Certain creditors obtained judgments against an insolvent limited partnership, upon failure to answer, and levied execution on the partnership effects, after which the partners made a general assignment for benefit of creditors, without preferences. *Held*, that at suit of a creditor at large those proceedings would be enjoined, and a receiver appointed to take charge of all the assets of the firm as they existed at the time of its insolvency, discharged of the liens of the executions, and to distribute the same equally among all the creditors. *Jackson v. Sheldon*, 9 Abb. Pr. 127.

Where there is a *fi. fa.* against a firm, and an older *fi. fa.* against one of the partners, the proceeds of a sale of partnership property must be applied first to the *fi. fa.* against the firm. *Crawford v. Baum*, 12 Rich. 75; *Coover's Ap-*

---

(*u*) 3 Jur. N. S. 31.

firm against the executors of Beckwith and the assignees of Young, praying for a declaration that Beckwith's real and personal estate was liable in equity, after satisfying his separate debts, to the joint debts of the firm; for an account of such debts at Beckwith's death; for an account of the joint assets received by his executors and Young's assignees;

peal, 29 Pa. St. 1. See *Miller v. Miller*, 3 Pittsb. 540; *Cope's Appeal*, 39 Pa. St. 284.

An action for a false return will not lie against a sheriff for returning an execution *nulla bona*, where the property of a firm is levied on under an execution against one of its members, and previous to a sale an execution against the firm comes to the hands of the sheriff under which the property levied on by the first execution is exhausted. *Dunham v. Murdock*, 2 Wend. 553; *Tappan v. Blaisdell*, 5 N. H. 189.

Where more is levied on partnership property than is sufficient to pay partnership executions, the balance may be applied to pay private executions in the hands of the officer. *Roop v. Rogers*, 3 Watts, 193.

B. & L., as a firm, were members of two other partnerships, and all three firms failed. The creditors of the two other firms put attachments on property belonging to B. & L. before the creditors of that firm attached it. *Held*, that the creditors of B. & L. were entitled to the proceeds of a sheriff's sale of the property. *Bullock v. Hubbard*, 23 Cal. 495.

Where the sheriff has in his hands at the time of the sale an execution against one partner, and also executions against the firm, and sells the goods absolutely and not in the interest of one partner

therein, the presumption is that he sold under the executions against the firm. *Rider v. Gilbert*, 16 Hun, 163.

A judgment recovered against all the partners of a firm upon process served upon all imports in itself the existence of a partnership debt. *Jaques v. Greenwood*, 12 Abb. Pr. 232.

Where there is a judgment against a firm, and the creditor has a priority under an execution on the property of such a firm, he retains it, though he does not show that his claim was on a partnership transaction, the presumption being that it was. *McDuffie v. Bartlett*, 3 Pa. St. 317.

In order, however, to entitle a judgment creditor on a bond given in the partnership name to be satisfied out of the proceeds of a sale of partnership property in preference to a prior execution against one partner levied on the same property, it is *held* that it must appear affirmatively that the bond was given to secure the payment of a partnership debt. *Snodgrass' Appeal*, 13 Pa. St. 471.

Firm property is not holden by an attachment in a suit based on the joint and several notes of the partners, and not being a partnership debt. *Buffum v. Seaver*, 16 N. H. 160.

A. and B., partners, executed a bond as follows, to wit: "We, A.

for an account of Beckwith's separate debts; that his real and personal estate might be applied first in payment of his separate debts, and then in payment of the joint debts;

and B., now trading under the firm of A. & Co., are held and bound, etc.; for payment whereof we bind ourselves, and each and every of our heirs, executors and administrators, jointly and severally." *Held*, that, whether the bond was binding on the partnership or not, it was the separate debt of each of the partners, and that the obligee was not bound to resort to the partnership in the first instance. *Perman v. Tunno*, Riley, Eq. 181.

In this action, commenced by one partner against his copartner to adjust the affairs of the partnership, which was insolvent, and to distribute its assets equally among its creditors, a receiver was by stipulation appointed. After the commencement of this action and the appointment of a receiver, and during the pendency of this action, other actions were brought against the firm by certain of their creditors and judgments were recovered therein, upon which supplementary proceedings were instituted, resulting in the same person being appointed receiver therein as in the first mentioned action. Subsequently the plaintiffs in the creditor's actions applied to have the receiver directed to pay their debts out of the assets in his hands. *Held*, that the judgments recovered by the plaintiffs gave them no priority over the other firm creditors, and that the order was properly denied. *Holmes v. McDowell*, 15 Hun, 586.

When there has been no transfer by the firm, and the property remains in specie and capable of being levied upon, it may be followed in the hands of those claiming by virtue of such transfers or proceedings, and may be levied upon by a judgment creditor of the firm. *Menagh v. Whitwell*, 52 N. Y. 147.

Accordingly, where two members of a firm of three mortgaged their interests to secure individual debts, and the third transferred his interest to a stranger, a levy under execution for a partnership debt upon the firm property, in the hands of a purchaser under the mortgage, is valid. *Menagh v. Whitwell*, 52 N. Y. 147.

Certain real estate being owned by a firm composed of two partners, and used in the business of the partnership, one of them alone executed a mortgage on an undivided half of it to secure the payment of his individual debt. Afterwards said real estate was sold at sheriff's sale under a judgment rendered after the execution of said mortgage against the partners for a debt of the firm contracted before the execution of the mortgage. *Held*, that the mortgagee was not entitled to foreclose his mortgage, as against the purchaser at the sheriff's sale, without first redeeming or offering to redeem from the sheriff's sale that part of the real estate covered by said mortgage. *Kestner v. Sindlinger*, 33 Ind. 114.

and that a receiver might be appointed to get in the outstanding joint assets. The court held that the plaintiff was clearly entitled, as a creditor of Beckwith, to have his estate fully administered; and for that purpose to have an account taken of his separate estate; and to have the accounts between Beckwith's executors and Young's assignees also taken, in order to ascertain of what the joint estate consisted; and a decree was accordingly made for taking such accounts.

**Judgment in action by creditors of firm against the executor of a deceased partner.**—When a creditor of the firm proceeds against the assets of a deceased partner the form of the judgment which is given is in substance as follows: (*x*)

1. It is declared that all persons who are creditors of the deceased are entitled to the benefit of the judgment.

2. It is declared that the surplus of the estate of the deceased, after satisfying his funeral and testamentary expenses and separate debts, was liable at the time of his death to the joint debts of the firm, but without prejudice to the liability of the surviving partner as between himself and the estate of the deceased.

3. An account is directed to be taken of the funeral and testamentary expenses and separate debts of the deceased, and of the debts of the firm. If the surviving partner is not a party to the action, liberty is given him to attend in the prosecution of this last inquiry.

[\*601] \*4. An account is directed to be taken of the personal estate of the deceased.

5. It is ordered that his personal estate be applied, in the first instance, in the payment of his separate debts and funeral expenses, in a due course of administration, and then in payment of the debts of the firm.

6. And if the personal estate of the deceased is insuffi-

(*x*) See *Hills v. McRae*, 9 Ha. 407; *Rice v. Gordon*, 11 Beav. 297; *Harris v. Farwell*, 13 Beav. 271,

cient for the purposes of the action, inquiries are ordered to be made for the purpose of ascertaining the real estate to which the deceased was entitled.

The judgment will, if necessary, direct inquiries whether the creditors of the firm continued to deal with the surviving partners, and what sums have been paid by them to such creditors, and whether the creditors have, by their dealings with the surviving partners, released the estate of the deceased from the payment of their respective debts. (*y*)

Additional inquiries will be directed if necessary, and as the necessity for them appears. (*z*)

No directions are usually given for the purpose of keeping distinct the joint and the separate estates; but, if necessary, it is conceived that such directions would be given in order that the principles upon which the judgment is framed might be properly carried out. (*a*)

In *Ridgway v. Clare*, (*b*) two partners, A. and B., had died. A suit was instituted by a separate creditor of A. for the administration of his estate; a suit was also instituted by a separate creditor of B. for the administration of his estate; a third suit was instituted by a joint creditor of A. and B. for payment of a debt due from both out of both their estates; and a fourth suit was instituted by the representatives of A. against the representatives of B. for taking the accounts of the partnership. The plaintiff in the third suit was found to be a creditor \*of both A. [\*602] and B., but he was held by the master not to be entitled to rank as a separate creditor of A. On an appeal from the decision of the master, the court thought it de-

(*y*) See the decree in *Devaynes v. Noble*, 1 Mer. 530, and in *Fisher v. Farrington*, Seton on Decrees, ed. 4, p. 1210.

(*z*) *Barber v. Mackrell*, 12 Ch. D. 534, as to money fraudulently withdrawn by one partner from the assets of the firm.

(*a*) See *Rice v. Gordon*, 11 Beav. 271; *Ridgway v. Clare*, 19 Beav. 111; *Woolley v. Gordon*, Taml. 11; *Paynter v. Houston*, 3 Mer. 297.

(*b*) *Ridgway v. Clare*, 19 Beav. 111.

sirable that the separate creditors should be ascertained, but reserved the question whether the joint creditor was or was not entitled to rank as one of A.'s separate creditors. The judgment, however, is instructive, as it states the manner in which the court administers the assets of a deceased partner, and pays each class of creditors. It appears that, when there are assets sufficient to pay all the creditors, the estate of the deceased forms one fund, out of which the joint and separate creditors are paid *pari passu*; but that they, and the funds for their payment, are distinguished when the assets are in any way deficient.

**Secured creditors.**—A creditor who holds a security cannot retain his security and prove for his whole debt, nor realize his security and prove for more than the balance then remaining due to him; if he proves for his whole debt he must give up his security as in bankruptcy. The rule in chancery was formerly otherwise. (c)<sup>1</sup> This, however, was altered by the Judicature Act, 1875. (d).

**Creditors' right to proceed both against the survivors and against the estate of the deceased.**—The creditors of a partnership having, on the death of one of the partners,

(c) *Bonser v. Cox*, 6 Beav. 84; *Mason v. Bogg*, 2 M. & Cr. 443; *Kellock's Case*, 3 Ch. 769.

<sup>1</sup> Where partnership creditors have secured themselves by mortgage they must abide by their contract, and are not preferred to individual creditors. *January v. Poyntz*, 2 B. Mon. 404.

A creditor of a partnership who has a mortgage on the separate property of one of the partners to secure him is not required to resort to such property for payment. *Roberts v. Oldham*, 63 N. C. 297.

In a suit to foreclose a mortgage given by W. on his individual property in this state, as "additional security" for the payment

of a debt of a partnership of which he was a member, and for which debt the creditor also held a mortgage on lands belonging to the firm situated in Wisconsin, *held*, that W. was not in the situation of a surety for his partner, so that he could compel a resort to the Wisconsin mortgage before the creditor could come upon him, because the mortgage was given to secure the note of the firm of which W. was a member, and therefore he was personally liable therefor. *Tiffany v. Crawford*, 14 N. J. Eq. 278.

(d) § 10. The act only applies to the estates of persons dying after its commencement.



a right to obtain payment from the surviving partners, and out of the assets of the deceased partner, the question arises whether the creditors can enforce both these rights, or whether they can only avail themselves of one of them.

**Before the Judicature Acts.**— Before the Judicature Acts, if the creditors proceeded at law against the surviving partners, but did not obtain satisfaction, they could afterwards proceed in equity against the estate of the deceased partner. (*e*) So if the surviving partners became bankrupt, and the creditors of the firm proved against their estate and received a dividend, they might nevertheless afterwards proceed against the estate of the deceased. (*f*) Again, \*as the creditors of the firm [\*603] could not in equity obtain any decree for payment by the surviving partners, but only a decree for payment out of the assets of the deceased partner, there was no reason why, even after a decree for the administration of the estate of the deceased, the creditors in question should not also proceed at law against the surviving partners. If, however, it could be shown that injustice would be produced by allowing the creditor to pursue both his remedies at once, the court would perhaps have compelled him to elect between them or have restrained him from proceeding at law. (*g*)

**Since the Judicature Acts.**— The Judicature Acts have so far altered the practice as to allow one action to be brought against the surviving partners and the legal personal representatives of the deceased; and the creditor will practically obtain payment from the survivors of the estate as may be most convenient; but if the estate of the de-

(*e*) *Jacomb v. Harwood*, 2 Ves. Sr. 235. one partner becomes bankrupt, and a creditor of the firm proves

(*f*) *Heath v. Percival*, 1 P. W. 682; *Devaynes v. Noble* (Sleech's Case), 1 Mer. 539. against his estate, he cannot afterwards sue the bankrupt and his copartners jointly. See *Bradley v. Millar*, 1 Rose, 273. The subject of election in bankruptcy will be

(*g*) See, as to the considerations which guided the court, *Ex parte Kendall*, 17 Ves. 525 and 526. If examined hereafter.

ceased is not sufficient to pay his separate creditors, the creditors of the firm will not be able to compete with them, but will have to look to the surviving partners. (*h*) A judgment, however, against the surviving partners is no bar to an action against the executors of a deceased partner; nor is a judgment against the latter a bar to an action against the former, (*i*) unless the personal liability of the surviving partners was sought to be enforced in the action against the executors.

**One action against the executors of several deceased partners.**— If more than one partner is dead, a creditor of the firm may, in one action, obtain a judgment against the estates of all of the deceased partners.

In a case before the late Vice-Chancellor Shadwell there was a partnership of seven persons, A., B., C., etc., and another partnership, A. and B., composed of two of the members of the first. A. and C. were dead. The surviving partners were bankrupt. The plaintiff, who [\*604] was a creditor of both firms, \*filed a bill on behalf of himself and all other the creditors of A., and on behalf of himself and all other the creditors of C., against the real and personal representatives of A., the personal representatives of C., and the assignees of the bankrupts. The bill prayed that an account might be taken of what was due from A. and C. respectively to the plaintiff, and their other joint and separate creditors, and of the personal estates of A. and C., and of the real estate of A., and that the personal estates of A. and C. and the real estate of A. might be applied in payment of their respective debts, as well joint as separate. This bill was demurred to on the ground of multifariousness, but the vice-chancellor overruled the demurrer, and held the frame of the suit to be proper in point of form. (*k*)

(*h*) See *ante*, p. 598, and Jud. 265; Liverpool Borough Bank *v.* Act, 1875, § 10. Walker, 4 De G. & J. 24. See *ante*,

(*i*) *Re* Hodgson, 31 Ch. D. 177; book ii, ch. 2, § 1. *Jacomb v. Harwood*, 2 Ves. Sr. (*k*) See *Brown v. Douglas*, 11 Sim.

## 2. *With reference to what has occurred since death.*

Having now examined the position of the executors of a deceased partner with reference to the creditors of the firm, and in respect of debts existing at the time of the death of the deceased, it is proposed to consider the liability of the assets of the deceased, and of his executors, in respect of what may have taken place since his death.

**Personal liability of executors.**—With respect to the executors themselves, it is clear that, if the executor of a deceased partner carries on the partnership business, the executor becomes personally liable to third parties as if he were a partner in his own right; (7)<sup>1</sup> and if the executor

283; *Brown v. Weatherby*, 12 Sim. 6. Since the Judicature Acts it is a mere question of convenience whether there shall be one action or more. See Ord. XVIII, rr. 4, 16, and Ord. XVIII, rr. 1 and 6.

(7) See *Wightman v. Townroe*, 1 M. & S. 412; *Labouchere v. Tupper*, 11 Moo. P. C. 198; *Ex parte Garland*, 10 Ves. 119; *Ex parte Holdsworth*, 1 M. D. & D. 475. As to his liability to creditors by merely sharing profits with the surviving partners, see *Holme v. Hammond*, L. R. 7 Ex. 218, *ante*, p. 32. See as to the executors of sole traders, *Re Evans*, 34 Ch. D. 597.

<sup>1</sup> *Citizens' Mutual Ins. Co. v. Ligon*, 59 Miss. 305; *Wild v. Davenport*, 48 N. J. L. 129; *Avery v. Myers*, 60 Miss. 367.

In *Wild v. Davenport* it was considered that an executor engaging in business in a partnership with testator's assets, though not for his individual benefit, will be personally liable for debts contracted in the business, although he does so in compliance with his

testator's will, or in conformity with the articles of partnership to which the testator was a party.

But where the assets of the decedent are continued in the business without the assent and against the will of the executor, who takes no part in the conduct of the business, he is not personally liable for the debts contracted by the surviving partner in the conduct of the business after the death of the testator. *Avery v. Myers*, 60 Miss. 367.

To make the executors of a deceased partner liable personally as partners with the surviving partner for the firm debts it must appear that they voluntarily entered into such partnership and employed the testator's assets in the business of the same. It is not sufficient to so charge them that the business is carried on by surviving partner with the assent of the executors, and that they allow the testator's share of the capital to remain in the business for the benefit of the *cestuis que trust*, when it is done in accordance with the in-

accepts or indorses bills of exchange or promissory notes either in his own name as executor, (*m*) or in the name in which the deceased carried on business, (*n*) the executor

structions of testator's will, or with the partnership agreement. *Richter v. Toppenhusen*, 39 How. Pr. 82.

A partnership was formed between J. and E., and the business conducted some time, when in 1842 J. died, leaving a will by which he appointed his wife, E., his partner, and M. his executors, to whom he devised his entire estate in trust for certain purposes. He directed that the business should be conducted after his death by E., and that the trustees under the will should not withdraw from the business of the firm any part of the capital which he had invested therein, unless it was necessary for them to do so in payment of his debts. The business was continued by E. according to the directions of the testator until 1857, when T. was taken into the firm, and an article of agreement entered into between E., acting in his own right, and jointly with the widow of J., and M., trustees under the will, and T., by which it was provided that the business should be carried on under the old name, and should continue for a specified time — the net profits to be divided into three equal parts, one of which was to go E. in his own right, one to the trustees under the will of J., and the remaining part to T. It was also provided that in the case of the death of E. his "executors or trustees, or both," should hold the same relations to the firm as he did

in his life-time. This agreement was assented to by the heirs-at-law of J. Subsequently the widow of J. died, and in 1862 the article of agreement was continued for seven years by E., acting for himself and jointly with M. as surviving executors and trustees of J., and by T. This contract was also assented to by the children of J. E. died leaving a will by which he provided for the continuance of his interest in the business. He appointed O. and D. his executors; the latter renounced, and the former became sole executor. The business was carried on in the same name and at the same place until 1868, when the firm failed. An action was brought by a creditor of the firm against M., seeking to charge him as a partner for the debt. M. never participated in any way in the management of the business of the firm, nor exercised any control or supervision over the same, nor received any portion of the profits thereof directly or indirectly; and never gave any authority for the continuance of the firm after the death of E. *Held*, that M. was not a partner in the firm and was not personally liable, as a partner, to a creditor of the firm. *Owens v. Mackall*, 33 Md. 382.

The legal representatives and widow of a deceased partner suffered his share to remain in the firm, which was continued for some years, when a new firm was

(*m*) *Liverpool Borough Bank v. Walker*, 4 De G. & J. 24.

(*n*) *Lucas v. Williams*, 3 Giff. 150.

will be personally liable to be sued on such bills or notes. Whether \*in such cases the executor is en- [\*605] titled to be indemnified out of the assets of the deceased is altogether another question, and depends upon whether the executor has carried on the business pursuant to the will of the deceased, or the directions of those beneficially interested in his estate.

**Liability of estate of deceased partner for what occurs after his death.**— With respect to the direct liability of the assets of the deceased to creditors, it may be taken as a general proposition that the estate of a deceased partner is not liable to third parties for what may be done after his decease by the surviving partners;<sup>1</sup> and on that ground it

formed between the surviving partner and the widow's second husband. She intervened in the contract, and consented that the balance due her as widow in community should remain with the new firm as a loan, on which she was to receive interest. *Held*, that she was a creditor of the new firm and not a partner. *Brower v. Creditors*, 11 La. Ann. 117.

If the administrators of a deceased partner ignorantly take the partnership books and collect some of the debts, they do not thereby become responsible to the surviving partner for all the partnership debts. *Alexander v. Coulter*, 2 S. & R. 494.

<sup>1</sup> A stipulation in the articles that if either partner dies before the expiration of the limited period the survivor shall continue the business for the unexpired term gives the survivor the right to employ all the partnership effects without material change in the business for the residue of the term, but confers on him no authority to fasten any new debt or liability on the estate

of the deceased partner. *Vincent v. Martin*, 79 Ala. 540. See, also, *Edgar v. Cook*, 4 Ala. 588; *National Bank of Newburgh v. Bigler*, 83 N. Y. 51; S. C. 18 Hun, 400; *Balantine v. Frelinghuysen*, 38 N. J. Eq. 266.

A stipulation in partnership articles that, in case of the decease of either partner, the business may be carried on for one year by the survivor for the mutual benefit of both parties, does not, in case of the death of one partner, justify the allowance against his insolvent estate of a debt contracted by the survivor within the year, with one who had notice of the death. *Stanwood v. Owen*, 14 Gray, 195.

A company was formed to go to California. Among other articles of agreement was one that in case of the death of a party his nearest relatives should receive half his share of the profits, so long as the concern lasted. *Held*, not to be a partnership, and that the court had no equity power over it as such. *Knowlton v. Reed*, 38 Me. 246.

has been held that they cannot be restrained at the suit of the executors of the deceased from continuing to carry on the business of the late firm in the old name. (o)

In the great case of *Devaynes v. Noble*, (p) some bills deposited with a firm of bankers were, after the death of one of the partners, misapplied by the surviving partners, and an attempt was made to obtain out of the estate of the deceased the value of the bills so misapplied. But the attempt was not successful, Sir Wm. Grant observing:

“If there be no remedy at law against the executors of Mr. Devaynes, I am at a loss to understand the equity on which this court is to interpose to make good the loss against Mr. Devaynes' estate. It has not been incurred by anything that he did or neglected to do. The bills were safely kept as long as he had anything to do with them. From the act of placing them in the custody of a partnership, it followed that upon the death of one of the partners they would fall into the possession of the surviving partners. Mr. Houlton himself, therefore, has virtually placed them there. Mr. Devaynes' executors could not take them away; Mr. Devaynes could not direct his executors to take them away; and though Mr. Devaynes has neither been personally instrumental in the loss, nor personally benefited by it, nor could have prevented it, yet it is contended that it is upon his estate the loss ought to be thrown, and that by a court of equity. I apprehend, however, that it would be the reverse of equity to throw the loss on his estate in such a case as the present. It might be as well contended that if they had thrown the bills into the fire, or lost them by negligence, Mr. Devaynes would be responsible for such act or negligence. He had no more to do with the sale of the bills than he would have had to do with a loss occasioned by such means as these.”

[\*606] **\*Liability of the assets for the acts of the executor.**—Moreover, although an executor has power to dispose of the assets of the deceased, and to keep alive de-

Where the mode of closing the business of a firm is by the creation of a new one, in accordance with the will of a deceased partner, composed of the surviving partner and the representatives of the deceased, the creditors of the new firm are clothed with the equities of that firm against the estate of the decedent arising out of the

payment by the new firm of the debts of the old. *Laughlin v. Lorenz*, 48 Pa. St. 275.  
 (o) *Webster v. Webster*, 3 Swanst. 490, note. But see as to selling good-will, *ante*, p. 443.  
 (p) *Houlton's Case*, *Johnes' Case*, and *Brice's Case*, 1 Mer. 616, etc. See, too, *Vulliamy v. Noble*, 3 Mer. 614.

mands against them which would otherwise become barred by the statute of limitations, still the acts of an executor, to whatever extent they may render him personally liable, do not impose liability on the assets of the deceased, unless those acts have been properly performed by the executor in the execution of his duty as executor. At the same time there are certain acts which, if done by an executor, impose liability on the assets of the deceased; (*q*) and, therefore, if a partner appoints a copartner his executor, and dies, and the executor continues to carry on the business, it is possible that some of his acts, attributed to him, not as partner but as executor, may render the assets of the deceased liable for what may have occurred since his death. (*r*) But this is quite an exceptional case. (*s*)

**Effect of employment of assets in the business of the firm.**—If an executor of a deceased partner carries on the partnership business pursuant to directions contained in the will of his testator, the executor will, as already pointed out, render himself personally liable for debts contracted in so doing, but he will be entitled to indemnity in respect thereof out of the estate of the deceased; (*t*) and consequently if a deceased partner has himself directed his assets or any part thereof to be employed in carrying on the partnership business, so much of them as are directed to be employed are liable to make good the debts contracted during their employment. For these reasons, and to this extent, therefore, his estate will be applicable to the liquidation of the demands of those who have become creditors of the partnership after his decease. But it must not be supposed that a creditor of an executor or trustee can always stand in his place to the extent to which he is entitled to be

(*q*) See Williams on Executors, *Re Johnson*, 15 id. 548; *Farhall v. Farhall*, 7 Ch. 123; *Owen v. Dela-*  
vol. ii, 1798, ed. 8.

(*r*) See *Vulliamy v. Nobles*, 3 mere, 15 Eq. 134.  
Mer. 614.

(*t*) *Labouchere v. Tupper*, 11  
(*s*) See *Re Evans*, 34 Ch. D. 597; *Moore*, P. C. 198, and the cases in  
*Strickland v. Symons*, 26 id. 245; the following notes.

indemnified out of the trust estate. *Prima facie* a creditor must look for payment to his legal debtor; and the fact that the latter is entitled to be indemnified by some one [\*607] \*else, or out of some estate, does not confer any additional right on the creditor. To avail the creditor something more is necessary, viz., the existence of a trust fund expressly devoted to carrying on the business in respect of which the debt to the creditor has been contracted. (u)

In *Strickland v. Symons*, (x) a lunatic asylum was vested in the defendant on trust for sale. He carried it on for a time and then sold it for a large sum of money. The plaintiff had supplied the defendant with goods for the use of the asylum, and not being able to obtain payment from the defendant the plaintiff brought an action for payment out of the trust estate. But he was held not entitled to such payment, there being no particular trust estate appropriated for the purpose of carrying on the asylum.

In *Re Evans*, (y) the widow and administratrix of a deceased builder carried on his business, and in so doing contracted debts to the plaintiff. The plaintiff obtained judgment against her and sought to obtain payment out of the proceeds of the sale of the goods which she had bought, but which proceeds, as between her and the estate, were assets of the deceased. It was held that the plaintiff was not entitled to any such relief. The plaintiff was declared entitled to a lien on the beneficial interest of the widow in the estate of the deceased. This was the utmost he could be entitled to; and the court of appeal carefully refrained from deciding whether he was entitled to so much.

**Trust to carry on business.**—If, however, there is a trust fund specially appropriated to carrying on a particular business, and the trustee in carrying it on contracts debts, the

(u) See, in addition to the cases cited below, the American authorities, *Jones v. Walker*, 13 Otto, 444; *Smith v. Ayres*, 101 U. S. 320. (x) 26 Ch. D. 245, and 22 id. 666. (y) *Re Evans*, 34 Ch. D. 556. Observe that the plaintiff had not seized the goods under a *fi. fa.*



creditors are entitled, not indeed to payment out of the fund as *cestuis que trustent*, but to stand in the place of the trustee, and to obtain out of the fund what, if anything, may be payable to him by way of indemnity. But if he is a defaulting trustee the creditors can obtain nothing out of the trust fund until he has made good what he owes it. The most recent case on this subject is *Re Johnson*, (z) in which \*the previous authorities were reviewed by [\*608] Jessel, M. R., and in which the right of the creditors to the extent above stated, but no further, is clearly enunciated.

**Proof by the executor in the event of bankruptcy.**—Most of the other cases which have occurred upon this subject have arisen where an executor, having continued in business with a surviving partner, and having become bankrupt with him, has endeavored to withdraw from the joint estate the assets of the deceased employed in the trade. In such cases the executor has been held entitled to prove for the value of the assets which he embarked in the business without authority, such assets being in substance an unauthorized loan of trust money; but he has been held not entitled to prove as against joint creditors for the value of those assets which his testator authorized to be so continued in the business.

In *Ex parte Garland*, (a) a miller and farmer made a will whereby he directed his wife to carry on his business, and that for the purpose of enabling her to carry it on, any sum not exceeding 600*l.* should be advanced to her by his trustees. He also directed his wife to give her notes of hand for what might be advanced, and for the value of the stock, crops and effects in his business. He appointed his wife and the trustees before alluded to his executors. After his death his widow carried on the business, the stock, crops,

(z) *Re Johnson*, 15 Ch. D. 548.

(a) 10 Ves. 110. See, also, *Ex parte Butterfield*, De G. 570, and other cases of that class, noticed

hereafter under the head Bankruptcy. See, also, the Irish case, *Hall v. Fennell*, Ir. Rep. 9 Eq. 406, and on appeal, id. 615.

and effects in which were valued at 1,351*l.* 5*s.* 0*d.* She also received 600*l.* from the trustees for the purpose of enabling her to carry on the business, and for these two sums she gave them her promissory notes. She also became indebted to the estate of the testator in a further sum of 768*l.* 12*s.* 4*d.* She then became bankrupt, and an attempt was made to prove as debts due from her to the estate of the deceased the three sums of 1,351*l.* 5*s.* 0*d.*, 600*l.*, and 768*l.* 12*s.* 4*d.* But it was held by Lord Eldon that although the last sum might, the two first could not, be proved against her estate; for they represented property which the deceased had authorized to be embarked in trade, and which was therefore answerable to the creditors of the trade. (*b*)

[\*609] \*It follows from the cases cited above that, where a trust fund is appropriated to carrying on a business, the creditors of those who carry it on are better off than the creditors of ordinary partners, inasmuch as these last have nothing to look to except the property of the partners; whereas, in the case supposed, the creditors have not only the personal security of the executors and trustees who carry on the business, but also a right to stand in their place to the extent to which they are entitled to indemnity (*c*) out of the assets of the deceased.

**Creditors before death preferred to subsequent creditors.**—The liability of the estate of a deceased partner to persons who become creditors after his decease is subject to its liability to those who were his creditors at his decease. These last must first be paid; and although, as in such a case as *Ex parte Garland*, they might not be able to follow the assets of the deceased into the hands of the trustee in bankruptcy, yet, in administering the estate of a person

(*b*) See for other illustrations of the same doctrine, *Ex parte Richardson*, Buck. 208, and 3 Mad. 138; *Thompson v. Andrews*, 1 M. & K. 116; *Cutbush v. Cutbush*, 1 Beav. 184; *Scott v. Izon*, 34 Beav. 434. (c) See *Re Johnson*, 15 Ch. D. 548. In this last case it was attempted

whose assets have been employed in trade in pursuance of directions contained in his will, the creditors who have become such since his decease cannot compete with his other creditors. (*d*)

**Amount of estate liable where assets are directed to be continued in the business.**—It has at various times been contended that, when a testator directs a trade or business to be carried on after his decease, he thereby subjects *all* his assets to the payment of debts incurred in the course of carrying it on; and a decision by Lord Kenyon (*e*) has been supposed to warrant such contention. It is now, however, clearly settled that the extent of the liability of the testator's estate does not exceed the amount authorized by him to be employed in the trade or business directed by him to be carried on, (*f*)<sup>1</sup> and it is generally admitted that

(*d*) See *Cutbush v. Cutbush*, 1 Beav. 184.

(*e*) *Hankey v. Hammock*, Buck. 210, and 3 Madd. 148.

(*f*) See the cases in the last three notes, and *Strickland v. Symons*, 26 Ch. D. 245; *Re Johnson*, id. 548; *Owen v. Delamere*, 15 Eq. 139; *McNeillie v. Acton*, 4 De G. M. & G. 744.

<sup>1</sup>*Cook v. Rogers*, 8 Am. Law Record, 641; S. C. 3 Fed. Rep. 69.

Stipulations in articles for the continuance of a firm after the death of a member and until the consent of all partners is given to a dissolution are valid, and will prevent a dissolution upon the death of a partner. *Leaf's Appeal*, 105 Pa. St. 505; S. C. 14 Weekly Not. Cas. 507; 41 Leg. Intel. 450. See, also, *Lewis v. Alexander*, 51 Tex. 578; *Mason v. Slevin*, 1 Tex. App. (Civ.) 13; *Cook v. Rogers supra*.

Nothing but the clearest and most unambiguous language, dem-

onstrating in the most positive manner, by contract or by will, the intention of the decedent to make his general assets liable for debts contracted in continuing trade after his death, will render his estate a partner. *First Nat. Bank v. Farmers' Deposit Nat. Bank*, 5 Cent. R. 505; *Cook v. Rogers, supra*.

Power to continue a testator's estate in a mercantile firm is not inferable from the executor's authority to manage and convey at discretion as trustees for the devisees, where the will contains no reference to partnership. *Citizens' Mutual Insurance Co. v. Lignon*, 59 Miss. 305.

A clause in a will providing for the continuation of the firm does not of itself continue the old firm or create a new one; to give it effect the surviving partner must assent and continue the business with that understanding and intention. *Exchange Bank v. Tracy*, 77 Mo. 594.

the decision of Lord Kenyon is not inconsistent with this doctrine. (g)

[\*610] **\*Effect of general direction to carry on trade.**

It becomes, therefore, a matter of considerable im-

Where the articles provide that, on the death of a partner during the partnership term, his executor shall be entitled to deceased's place in the firm with deceased's capital, the executor has an option to come in or not and a reasonable time within which to elect; if he elect to come in he comes in with all the rights and liabilities of a partner, and is personally liable for all debts contracted in the business. *Wild v. Davenport*, 48 N. J. L. 129. See, also, *Hart v. Auger*, 38 La. Ann. 341.

But articles which simply provide that on the death of one partner his capital shall be left in the business till the end of the firm do not require the admission of the executor in the management or control of the business, and if he does not personally engage in the business he will not personally be liable for debts, though he leaves the testator's capital in the firm. In such cases creditors becoming such after the death of one of the partners have only the liability of the surviving partner by whom the business is carried on and the security of the capital of the deceased partner which is left in the business. *Wild v. Davenport*, 48 N. J. L. 129.

A clause in a will authorizing the continuance of a partnership in a plantation until the plantation can be properly improved and suc-

cessfully operated, say for two years, and after that the plantation to go as the law directs, only authorizes a continuation of the partnership in the same manner and for the same purpose as originally contemplated by the contract of partnership. *Berry v. Folkes*, 60 Miss. 576.

Directions in a will that the business of a banking firm of which the testator was a member shall be continued does not render liable to subsequent creditors of the bank a part of his estate not invested in this business, unless it appears unequivocally that he intended it to be bound; his intention is to be gathered from the entire will; but, notwithstanding authority given his surviving partner to sign the firm name to contracts as if the testator was living, a declaration that the capital of the company is to remain and be used as heretofore excludes the idea that he intended to invest his other estate. *Brasfield v. French*, 59 Miss. 632.

Where the articles of copartnership provide that the partnership shall not be dissolved by the death of one of the partners, but that his executor shall act in his stead, the estate of such partner shall be liable for debts contracted during the existence of the partnership after his death; and this liability is not limited by the amount which the deceased partner put into the firm,

---

(g) See the observations of Turner, L. J., in 4 De G. M. & G. 744.

portance, not only to executors but to creditors, to ascertain what a testator who directs his trade or business to be carried on has authorized to be employed in carrying it on. This must, of course, depend on the terms of his will; but

but extends to his whole estate. *Blodgett v. National Bank*, 49 Conn. 9.

A special clause of a codicil providing for the leaving of the testator's present capital in the business for a certain time, construed in *Dean v. Dean*, 54 Wis. 23.

Where the last will and testament of a partner directed that his interest in a firm of which he was a member at the time of his death "be continued therein and be chargeable for its debts and liabilities," but that his "other property should not be so chargeable," *held*, the general assets of his estate were not bound for firm debts contracted after his death. *Jones v. Walker*, 103 U. S. 444.

Where the profits arising from such interest were, pursuant to the will, paid from time to time, the firm being then free from debt and its capital undiminished, and subsequently it became bankrupt, *held*, that the legatees receiving such property were not liable therefor to the assignee in bankruptcy. *Jones v. Walker*, 103 U. S. 444.

Under a provision that the capital of a firm shall remain and be used as heretofore until the expiration of two years or such further time as may be necessary to close the business without injury to either party, the survivor may charge the testator's interest by a contract made more than two years after his death. *Brasfield v. French*, 59 Miss. 632.

The executor of the deceased partner, where the articles stipulate that the partnership shall be continued by such executor, has power to pledge the assets of the estate for the purpose of raising necessary funds for the use of the firm. *Blodgett v. National Bank*, 49 Conn. 9.

Where the widow of a deceased partner takes her husband's place in the firm with the intention that there shall be no change in the business of the firm, she will be considered as intending to assume the same burdens and share the same benefits in the firm that her husband would if living, and so takes his place in all contracts whereby he was bound. *Frazer v. Howe*, 106 Ill. 563.

If, therefore, the firm, after she comes into the same, continues to execute a contract made before, whereby she derives benefit, and the firm afterwards repudiates the contract under the statute of frauds, she will be liable with the other partners under *quantum meruit* of the other party to the contract for his services and expenditures. *Frazer v. Howe*, 106 Ill. 563.

Where the widow upon the death of her husband, in the exercise of a prudent discretion, but before she was appointed administratrix, arranges with the surviving partner for the retention in the business of the decedent's share, the same to draw interest upon an agreed valu-

it has been held that a general direction to carry on a business in which the testator was engaged at the time of his death does not authorize the employment, for the purposes of that business, of more of his assets than are em-

ation and the principal to be paid as soon as practicable, it was held, the wife being subsequently appointed administratrix, that this arrangement should not be condemned as illegal. *Browne v. Bedford*, 4 Dem. (N. Y.) 304.

In Louisiana, a widow, even where she has accepted the succession of her husband without benefit of inventory, is not liable *in solido* with surviving partner upon a note by the firm of which her husband was a member. *Henderson v. Wadsworth*, 115 U. S. 264.

Where the widow of a deceased husband, who, at the time of his death, owned with his wife as community property, a stock of goods, continues without administration to carry on the mercantile business under the old name with the consent of the husband's heirs, the widow receiving the profits, *held*, that for debts contracted in keeping up the business the property of the widow and those of the heirs engaged in conducting it is liable whether it consisted of stock in trade or other means. *Cleveland v. Harding*, 67 Tex. 396.

The testamentary gift to the executor of all the decedent's interest in a partnership, in trust to invest as fast as realized, together with full power to settle with his partners, confers on the executor the fee of the decedent's partnership real estate, with power of sale. *Naar v. Naar*, 41 N. J. Eq. 88.

R., by a single clause in his will,

directed his executor to continue, keep up and represent his shares and interests in three several partnerships, of each of which he was a member, until such time after his death as said executor should think it most advantageous to his estate to sell out, or settle up and close the said shares and interests respectively, but did not use such language as to show that he intended to bind his general estate for the debts of either of these partnerships that might be incurred after his death. The partnerships were carried on after his death as directed. Two of them made large profits, which came into the hands of the executor. The other became insolvent. *Held*, that the creditors of the insolvent firm whose claims accrued after testator's death had no right to be paid out of the profits of the successful partners any more than out of any other property of testator's estate not embarked in the insolvent partnership. *Cook v. Rogers*, *supra*,

A partner, by his will, made his brother, who was his copartner, executor, and devised to him the residue of his estate in trust for certain purposes, and authorized him to use in his business the property given him in trust until it should be wanted for distribution. *Held*, that the intent of the will was that the residue only should be used in business, and that the surviving partner was bound to

barked therein when he dies. (*h*) It has also been held that a bequest by a person of money upon trust to allow it to remain in the concern of which he is a partner does not necessarily empower the trustees to trade with that money; for the context may show that all the testator meant was that the sum in question should not be called in, but be allowed to remain outstanding as a loan to the surviving partners. (*i*) It has also been held that a trust to sell a business is not for this purpose equivalent to a trust to carry it on until sale. (*k*)

### SECTION III.—CONSEQUENCES AS REGARDS THE SEPARATE CREDITORS, LEGATEES AND NEXT OF KIN OF THE DECEASED.

In considering the consequences of the death of a partner as regards his separate creditors, and his legatees, or next of kin, it will be convenient, first of all, to examine their rights under ordinary circumstances, and then to advert to the complicated questions which arise when the assets of the deceased, instead of being realized, are allowed by his executors to be employed in the business carried on by the firm to which he belonged, and when shares are specifically bequeathed.

settle the affairs and pay the debts of the firm, in the usual way, notwithstanding this clause. *Re Clap*, 2 Lowell, 168.

An agreement by representatives to allow deceased partner's interest to remain in new firm changes their shares from capital to debt of new firm. *Robinson v. Simmons*, 5 N. Eng. Rep. (Mass.) 743.

Where a will authorizes the testator's executor to make such a settlement with the surviving mem-

bers of the firm as he deems best for the estate, a settlement made in accordance therewith will be upheld. *Ilse v. Ilse*, 6 So. West. Rep. (Ky.) 120.

(*h*) See *McNeillie v. Acton*, 4 De G. M. & G. 744, where further capital was required. See, also, *Re Cameron*, 26 Ch. D. 19.

(*i*) See *Travis v. Milne*, 9 Ha. 141.

(*k*) *Strickland v. Symons*, 26 Ch. D. 245, *ante*, p. 607.

1. *Rights of separate creditors and legatees generally.*

**Legatees, etc., of deceased partner must look to his executor.**—Under ordinary circumstances, the separate creditors, legatees and next of kin of a deceased [\*611] partner must look for \*payment of what is due to them out of his assets to his legal personal representative, and to him alone. (l) The executors are, under ordinary circumstances, the only persons who have a right to call upon the surviving partners for an account; and of this right they do not divest themselves by a sale and assignment of the share of the deceased; for the effect of such sale and assignment is only to make the executors trustees for the purchaser. (m)

A leading case illustrating the doctrine that the executors of a deceased partner are, under ordinary circumstances, the only persons entitled to require an account from the surviving partners, is *Stainton v. The Carron Company*. (n) There a bill was filed by the residuary legatees of a person who had been the agent of and a shareholder in a company, against his executors and other persons interested in the will of the deceased, and against the company. The bill charged that the executors, as agents, managers and shareholders, had interests conflicting with their duties as executors and trustees; and the bill prayed (amongst other things) that the company might transfer the testator's shares to his executors, and that an account might be taken of what was due from the company to his estate, and for payment to the executors of the amount to be found due. The company and one of the executors demurred, and their demurrers were allowed. In delivering judgment the mas-

(l) *Alsager v. Rowley*, 6 Ves. 748; See *Maclean v. Dawson*, 5 Jur. N. Saunders v. Druce, 3 Drew. 140. S. 1091.

If there is no person who in this (m) *Clegg v. Fishwick*, 1 Mac. & country represents the deceased, a G. 294.

representative will be appointed. (n) 18 Beav. 146.



ter of the rolls thus summed up the effect of the cases on this subject:

“The persons interested in the estate of the testator, not being the legal personal representatives, will not be allowed to sue persons possessed of assets belonging to the testator, unless it is satisfactorily made out that there exist assets which might be recovered, and which, but for such suit, would probably be lost to the estate.” And again: “To support such a bill as this, it is not sufficient to prove that it may be an unpleasant duty to the executors and trustees to take the necessary steps for protecting the property intrusted to them. It is not sufficient to show that it will be for their interest not to take such steps; it is necessary to show that they prefer their \*interest to their duty, [\*612] and that they intend to neglect the performance of the obligation incidental to the office imposed upon them by the testator, and which they have undertaken to perform.”

**Wilful default.**—The executors, it may be observed, have, in ordinary cases, a personal interest in getting in the assets of the deceased; for, if they wilfully neglect so to do, they will be made to account for the assets, although they may not actually have received them. (*o*)

**Taking partnership account in action against executor alone.**—It must not, however, be supposed that in an action against the executor of a deceased partner by a separate creditor, legatee, or next of kin, no account of the deceased partner's share in the partnership can be ordered or taken; for it is the common course in such an action to direct an inquiry as to what is due to the estate of the deceased in respect of such share. (*p*) But in such an action no judgment can be given against the surviving partners for payment of what is due on the account; the executors must, if necessary, take proceedings against them to obtain such payment. (*q*)

(*o*) See, as to charging the executor of a partner with wilful default, *Grayburn v. Clarkson*, 3 Ch. 605; *Sculthorpe v. Tipper*, 13 Eq. 232; *Ward v. Ward*, 2 H. L. C. 777, and *Rowley v. Adams*, id. 726, and 7 Beav. 395; *Kirkman v. Booth*, 11 Beav. 273.

(*p*) As in *MacDonald v. Richardson*, 1 Giff. 81. See, also, *Pointon v. Pointon*, 12 Eq. 547, where the only surviving partner was an executor and trustee.

(*q*) Ord. xvi, r. 48, etc., and Ord. xviii do not apparently apply to such a case.

It seems that, under an ordinary judgment for the administration of the estate of a deceased partner, the partnership accounts will not be gone into unless the court specially directs some inquiry to be made with reference to the share of the deceased. (*r*) But it is difficult to see how any account of his personal estate can be taken without such an inquiry; and it has been decided more than once that if the surviving partners seek to obtain payment of a balance from the estate of the deceased on the partnership accounts, these accounts must be taken, although no special direction as to them may be contained in the [\*613] judgment. (*s*) The costs of an administration action brought by a separate creditor are paid in priority to joint creditors. (*t*)

**Cases in which the legatees, etc., of a deceased partner have a right to an account from the surviving partners.**—Notwithstanding, however, the general rule that the separate creditors, legatees or next of kin of a deceased partner have no *locus standi* against the surviving partners, this rule is by no means without its exceptions. Indeed there are cases to be met with which apparently warrant the inference that surviving partners may always be sued along with the executor or administrator of the deceased. (*u*) But the authority of these cases has recently been called in question, and the better opinion now is that some special circumstances are necessary to justify such a course. (*x*) The special circumstances which have been held sufficient are collusion between the executors and the surviving partners; (*y*) refusal by the former to compel the latter to

(*r*) See the next note.

(*s*) See *Paynter v. Houston*, 3 Mer. 297; *Baker v. Martin*, 5 Sim. 389; *Woolley v. Gordon*, Tam. 11.

(*t*) *Re McRea*, 32 Ch. D. 613.

(*u*) See *Newland v. Champion*, 1 Ves. Sr. 106, and 2 Coll. 46; *Bowsher v. Watkins*, 1 R. & M. 277.

(*x*) See *Yeatman v. Yeatman*, 7

Ch. D. 210; *Davies v. Davies*, 2 Keen, 534; *Law v. Law*, 2 Coll. 41; *Travis v. Milne*, 9 Ha. 141; *Stainton v. The Carron Co.* 18 Beav. 146.

(*y*) *Doran v. Simpson*, 4 Ves. 651; *Gedge v. Traill*, 1 R. & M. 281, note; *Alsager v. Rowley*, 6 Ves. 748.

come to an account; (z) dealings which may have precluded the executors from themselves obtaining any account; (a) the fact that the executors are themselves partners and liable, therefore, to account as partners to themselves as executors; (b) and generally, where the relation between the executors and the surviving partners is such as to present a substantial impediment to the prosecution, by the executors, of the rights of the persons interested in the estate of the deceased against the surviving partners, there, it has been said, an action may be instituted by those persons against the executors and the surviving partners. (c)

**Accounts settled between surviving partners and the executors of a deceased partner.**—If the surviving partners and the executors are different \*persons, [\*614] and they have *bona fide* come to an account respecting the partnership affairs, and have settled such account as a final account, the account thus settled is binding, as between the surviving partners and the persons interested in the estate of the deceased partner, and cannot be impeached save on the ground of fraud. (d)

**Where executors are personally interested.**—But arrangements made between executors and surviving partners for the benefit of the executors individually are always liable to suspicion; and if the executors are themselves the surviving partners or some of them, it becomes exceedingly difficult to make any arrangement which will be binding on the persons interested in the estate of the

(z) *Burroughs v. Elton*, 11 Ves. 29. The prayer of the bill in this case may be usefully referred to. But see *Yeatman v. Yeatman*, 7 Ch. D. 210, where refusal was held not to be a sufficient ground.

(a) *Law v. Law*, 2 Coll. 41, and on appeal, 11 Jur. 463; *Braithwaite v. Britain*, 1 Keen, 206.

(b) *Benningfield v. Baxter*, 12 App. Ca. 167; *Cropper v. Knapman*, 2 Y. & C. Ex. 333; *Travis v. Milne*, 9

Ha. 141. And see as to continuing the deceased's assets in the business, *post*, p. 614.

(c) *Travis v. Milne*, 9 Ha. 150. As to discovery by the surviving partners, see *Leigh v. Birch*, 32 Beav. 399, and Ord. xxxi, r. 7.

(d) *Davies v. Davies*, 2 Keen, 534; *Smith v. Everett*, 27 Beav. 446. See the Conveyancing Act, 1881, § 37.

deceased; for, even if any arrangement is assented to by such persons, it will be liable to be successfully disputed on any of those numerous grounds which are held to invalidate arrangements between trustees and their *cestuis que trustent*, and by which trustees do or may obtain a benefit at the expense of the trust estate. A remarkable instance of this is afforded by the case of *Wedderburn v. Wedderburn*, (e) where an account of a deceased partner's estate was directed, at the suit of the persons beneficially interested therein, although thirty years had elapsed since his death, and several changes had taken place in the firm, and releases had been given to the executors by their *cestuis que trustent*. (f)

2. *Rights of separate creditors and legatees when the share of the deceased is not got in.*

**Rights of legatees, etc., when the assets of the deceased partner are continued in the business.**—Executors, unless authorized by their testator so to do, ought not to leave his assets outstanding in the trade or business in which he was engaged when he died. It has been laid down as a rule without exception, that, to authorize executors to carry on a trade, or to permit it to be carried on with the property of a testator held by them in [\*615] trust, there ought to be the most distinct and positive authority and direction given by the testator for that purpose. (g) A bequest of his share and interest in the partnership to one person for life, and then to another, does not, without more, warrant the trustees of his will in keeping such share and interest unconverted into

(e) 2 Keen, 722, and 4 M. & Cr. 41, noticed *ante*, p. 533.

(f) See *Beningfield v. Baxter*, 12 App. Ca. 167, and the other cases as to profits accruing since death, *ante*, p. 528.

(g) *Kirkman v. Booth*, 11 Beav. 273. A power to executors named in a will to carry on a business does not justify an administrator in so doing if all the executors renounce. *Lambert v. Rendle*, 3 New R. 247.

money; and it is therefore their duty to realize it, and invest what they receive for the benefit of the legatees. (*h*)

**Option between interest and profits.**—If a testator's capital is left in the business as a loan to the surviving partners they are only liable to pay interest on it, even although they do not pay it off when they ought; (*i*) but where an executor improperly employs the assets of the testator in a business carried on by himself he is chargeable, at the option of the persons beneficially interested in the estate of the deceased, either with the sum employed and interest thereon at 5*l.* per cent., or with the sum employed and the profits made by its employment. (*k*) And such persons are not deprived of this option by the circumstance that it will be difficult and expensive to ascertain what part of the profits has arisen from the employment of the assets of the deceased; for whatever difficulty may exist is attributable to the conduct of the executor himself, and cannot, therefore, be effectually urged by him as a reason why no account of profits should be taken. (*l*) The *cestuis que trustent* are moreover entitled to compound interest if the duty of the executors is to call in their testator's capital, and invest it and accumulate the income; (*m*) but they are not entitled to profits for part of the time and to interest for \*the rest unless there has been some in- [\*616] intervening settlement of account, (*n*) or other special circumstance. (*o*)

(*h*) *Re Chancellor*, 26 Ch. D. 42; 655; *Townend v. Townend*, 1 Giff. 201; *Flockton v. Bunning*, 8 Ch. 323, note, *ante* p. 530.  
*Kirkman v. Booth*, 11 Beav. 273.  
 See *Skirving v. Williams*, 24 id. 275, and as to specific legacies of shares, *infra*, p. 619.

(*i*) See *Vyse v. Foster*, L. R. 7 H. L. 318, and 8 Ch. 300, noticed *ante*, p. 534. And see *infra*.

(*k*) See *Docker v. Somes*, 2 M. & K. 655; *Palmer v. Mitchell*, id. 672, note; *Heathcote v. Hulme*, 1 J. & W. 122.

(*l*) *Docker v. Somes*, 2 M. & K.

(*m*) See *Jones v. Foxall*, 15 Beav. 388; *Williams v. Powell*, id. 461. Possibly, also, in some other cases. See the observations in *Vyse v. Foster*, L. R. 7 H. L. 346.

(*n*) *Heathcote v. Hulme*, 1 J. & W. 122.

(*o*) As in *Townend v. Townend*, 1 Giff. 201, noticed *ante*, p. 528.

**Profits made since death.**— It follows from the doctrine above stated, and from the principles which were explained when treating of judgments for an account, (*p*) that if one of two partners makes the other his executor, and dies, the surviving partner must, under ordinary circumstances, not only account to the estate of the deceased for what may be due in respect of the testator's share in the partnership at his death, (*q*) but also for the profits made by him since his death by the employment of his capital in the business carried on by the late firm. (*r*) Moreover, it is immaterial whether such business has been continued by the surviving partner alone, or by him and others in partnership with him; for the obligation of the executor thus to account is founded on a breach of trust committed by him, for which he is liable at all events to the extent to which he has benefited by it, whether other persons are also liable or not; and being founded on a breach of trust an action in respect of it may be sustained against the executor alone, though he may only be one of several by whom the profits have been made. (*s*)

The cases illustrating the right of legatees to an account of profits made since their testator's death, where the executors have continued his assets in the business in which he was a partner, have been already adverted to at considerable length. (*t*) The following classified list of them is inserted here for reference:

1. *Account of subsequent profits decreed.*

A. Executors against surviving partners.

Yates *v.* Finn, 13 Ch. D. 839 (*ante*, p. 527).

Brown *v.* De Tastet, Jac. 284 (*ante*, p. 527).

Booth *v.* Parks, 1 Moll. 465, and Beatty, 444.

Featherstonhaugh *v.* Turner, 25 Beav. 382.

Smith *v.* Everett, 27 Beav. 446.

(*p*) *Ante*, p. 516 *et seq.*

(*r*) Phillips *v.* Phillips, Finch. 410.

(*q*) See the cases cited *infra*,

(*s*) See *ante*, p. 523.

pp. 616, 617.

(*t*) *Ante*, 521 *et seq.*

\*B. Legatee against executors who were not partners, but who continued his assets in his business.

Heathcote *v.* Hulme, 1 J. & W. 122.

Docker *v.* Somes, 2 M. & K. 654.

Palmer *v.* Mitchell, 2 M. & K. 672, note.

C. Legatees against executors who were surviving partners or who became partners.

Cook *v.* Collingridge, Jac. 607 (*ante*, p. 528).

Stocken *v.* Dawson, 9 Beav. 239, and on appeal, 27 L. J. Ch. 282.

Wedderburn *v.* Wedderburn, 2 Keen, 722, and 4 M. & Cr. 41 (*ante*, p. 533).

Townend *v.* Townend, 1 Giff. 201 (*ante*, p. 528).

Macdonald *v.* Richardson, 1 Giff. 81 (*ante*, p. 530).

Willett *v.* Blanford, 1 Ha. 253 (*ante*, p. 525). In this case accounts of subsequent profits were directed without prejudice to any question.

Flockton *v.* Bunning, 8 Ch. 323, note (*ante*, p. 530).

## 2. *Account of subsequent profits refused.*

A. Executor against surviving partner.

Knox *v.* Gye, L. R. 5 H. L. 656, the statute of limitations being a bar.

B. Legatee against executors, one of whom was a surviving partner, and the other of whom had become a partner.

Simpson *v.* Chapman, 4 De G. M. & G. 154 (*ante*, p. 532).

Vyse *v.* Foster, L. R. 7 H. L. 318, and 8 Ch. 300 (*ante*, p. 534).

See, also, Wedderburn *v.* Wedderburn, 22 Beav. 84, and Willett *v.* Blanford, 1 Ha. 253 (*ante*, pp. 533 and 525).

**Liability of surviving partners for assets improperly continued in the business.**—Upon the principle that every one concerned in a breach of trust with notice of the trust is answerable for such breach, it follows that if a partner dies, and his surviving partners allow his assets to remain in their business, with the knowledge that to suffer them so to remain is a breach of trust on the part of the executors, the surviving partners will be themselves responsible to the separate creditors, legatees, or next of kin of the deceased,

for any loss which may be thereby sustained. (u)  
 [\*618] \*And further, inasmuch as it is *prima facie* a breach of trust for executors to allow the assets of the deceased to remain in the business carried on by him at his death, surviving partners who knowingly carry on the business with assets of the deceased thus left in their hands will be answerable for such assets, unless they can show that no breach of trust was in fact committed. (x) Their liability to account for profits has already been considered. (y)

**Loans by executors.**—Where, however, the surviving partners and the executors are different persons, and the executors distinctly lend part of their testator's assets to his surviving partners, the latter are only liable to pay interest for it at the rate agreed upon with the executors. In such a case the legatees are not entitled to a share of the profits made by means of the money lent, although in lending it the executors may have been guilty of a breach of trust, and the borrowers may have known that the money belonged to the deceased. (z). *A fortiori*, if the executors are authorized to lend part of the assets of the deceased to his surviving partners, they will not be accountable for the profits they may make by the employment in their trade of money lent to them by the executors in pursuance of their authority; (a) nor, in such a case as is now supposed, will the executors be responsible for the money if lost, if they took such security for its repayment as, having regard to the will of the testator, it was their duty to take. (b)

(u) See *Wilson v. Moore*, 1 M. & K. 127 and 337; *Booth v. Booth*, 1 Beav. 125. And compare *Ex parte Barnewall*, 6 De G. M. & G. 801.

(x) *Travis v. Milne*, 9 Ha. 141.

(y) *Flockton v. Bunning*, *ante*, p. 530.

(z) See *Stroud v. Gwyer*, 28 Beav. 130; *Flockton v. Bunning*, 8 Ch. 323, note, and *ante*, p. 530; 44 and 45 Vict. ch. 41, § 37.

(a) *Parker v. Bloxham*, 20 Beav. 295; *Vyse v. Foster*, L. R. 7 H. L. 318, and 8 Ch. 300, *ante*, p. 534, where the testator's capital was not got in at the time appointed, and one of the executors was a surviving partner.

(b) *Paddon v. Richardson*, 7 De G. M. & G. 563.



**Executor becoming a partner.**—It sometimes happens that the executor of a deceased partner is taken into partnership by the surviving partners, and a question then arises whether the profits received by the executor as partner belong to him personally or to the estate which he represents. This must depend on the circumstances under which the executor became a partner. If he became a partner \*in his representative character, or, as in *Cook v. [619] Collingridge*, (c) under circumstances entitling the legatees to treat him still as their trustee, he must account for any profits which he may have obtained as a partner. On the other hand, if, as in *Simpson v. Chapman*, (d) he became a partner, not in his representative character, nor under such circumstances as those above mentioned, the profits accruing to him as a partner will be his own, and not form part of the assets for which he must account as executor.

### 3. *Specific bequests of shares.*

**Legacy of a share in a partnership.**—A specific bequest by a partner of his share in the partnership clearly does not entitle the legatee to become a partner himself unless there is some agreement to that effect binding upon the surviving partners. The right of the legatee is simply to be paid the amount due to the testator at the time of his death in respect of his share; (e) and also, under the circumstances and subject to the qualifications already noticed, (f) to receive a proportion of the profits made since the testator's death. As between the legatee, however, and the executor, the legatee is entitled to have the share kept in the business, subject only to the superior right of the executor to sell the testator's personal estate for the payment of debts. (g)

A bequest of a partner's capital has been held to include what was due to him in respect of advances. (h)

(c) *Jac.* 607, *ante*, p. 528.

(g) See *Fryer v. Ward*, 31 *Beav.*

(d) 4 *De G. M. & G.* 154, *ante*, 532. 602, where the legatee had an op-

(e) *Farquhar v. Hadden*, 7 *Ch.* 1. tion.

(f) *Ante*, p. 616.

(h) *Bevan v. A.-G.* 4 *Giff.* 361. A

**Legatee of good-will.**—It has been held that the legatee of a deceased partner's share in the good-will of the partnership business could not sue the surviving partners for a sale of the good-will and payment of his share, although the bequest had been assented to by the executors. (*i*)

[\*620] This case was somewhat peculiar, as in \*truth the surviving partner was entitled to everything which gave a salable value to the good-will. (*k*)

**Adeemption of legacies of shares.**—A specific bequest of a share in a partnership will be adeemed if the testator, after he has made his will, leaves the firm and receives his share; but so long as he remains a partner there will be no adeemption, although by some agreement subsequent to the date of the will the amount of his share may have been varied. (*l*) Even where he has, since he made his will, acquired the whole business, his will may include the whole. (*m*)

**Legacy to partner indebted to testator.**—A legatee is not entitled to receive, out of the estate of his testator, any part of the bounty intended for him by the testator until the legatee has paid all his own obligations in the shape of debts owing to the testator's estate. This principle is strongly illustrated by *Smith v. Smith*. (*n*) There a father, who had advanced money to a firm in which his son was a partner, died, having bequeathed part of his residuary estate to his son. The father's executors were held entitled to retain the whole amount of the partnership debt out of the son's share of the residue, although the debt was barred by the statute of limitations when the father died.

**Rights of tenant for life.**—When a share in a partnership is bequeathed or settled in trust for one person for life and afterwards to another, the first question which arises is whether the tenant for life is entitled to have the share

bequest of the use of capital employed in trade gives an absolute interest in it. See *Terry v. Terry*, 33 Beav. 232.

(*i*) *Robertson v. Quiddington*, 28 Beav. 529.

(*k*) See, on this subject, *ante*, p. 439.

(*l*) *Backwell v. Child*, Amb. 260; *Ellis v. Walker*, id. 309.

(*m*) *Re Russell*, 19 Ch. D. 432.

(*n*) 3 Giff. 263.

kept unconverted, or whether it ought to be converted into money and invested pursuant to the well-known doctrine laid down in *Howe v. Lord Dartmouth*. (*o*) This, of course, depends on the terms of the will; but its language must be clear to entitle the tenant for life to have the share kept unconverted. (*p*)

**Rights to profits, etc.**—A specific legatee of a share in a partnership is entitled to all ordinary profits declared after the testator's death; (*q*) \*unless although [\*621] declared after his death they were earned and ought to have been declared before. (*r*) But profits declared before a testator's death, (*s*) or declared afterwards when they were earned and ought to have been declared before, (*t*) *prima facie* form part of his general estate, and do not pass to the specific legatee of the share; and the same rule applies to dividends declared before his death, but the actual payment of which is postponed until afterwards. (*u*) Losses must not be thrown on capital so as to benefit a tenant for life at the expense of the remainder-man. (*x*)

**Apportionment of profits.**—The profits of an ordinary partnership are not within the Apportionment Act, 1870 (33 and 34 Vict. ch. 35), (*y*) although dividends of companies are within it. (*z*)

(*o*) 7 Ves. 137, and 2 Wh. & Tud. L. C.; *Dimes v. Scott*, 4 Russ. 195.

(*p*) See *Re Chancellor*, 26 Ch. D. 42, and *ante*, p. 615, note (*h*). See, also, *Re Cameron*, id. 19.

(*q*) *Jacques v. Chambers*, 2 Coll. 435; *Wright v. Warren*, 4 De G. & S. 367; *Browne v. Collins*, 12 Eq. 586; *Ibbotson v. Elam*, 1 Eq. 188.

(*r*) *Browne v. Collins*, 12 Eq. 586. But see *Ibbotson v. Elam*, 1 Eq. 188.

(*s*) See the next two notes.

(*t*) *Browne v. Collins*, 12 Eq. 586.

(*u*) *De Gendre v. Kent*, 4 Eq. 283; *Lock v. Venables*, 27 Beav.

598; *Wright v. Tuckett*, 1 J. & H. 266. Compare *Clive v. Clive*, Kay,

600, which turned on the special wording of the company's deed of settlement. See as to bonuses, *Bouch v. Sproule*, 12 App. Ca. 385, reversing 29 Ch. D. 635.

(*x*) See *Upton v. Brown*, 26 Ch. D. 588; *Gow v. Forster*, id. 672.

(*y*) *Re Cox's Trusts*, 9 Ch. D. 159; *Jones v. Ogle*, 8 Ch. 192. See before the act, *Ibbotson v. Elam*, 1 Eq. 188; *Browne v. Collins*, 12 Eq. 586; *Johnson v. Moore*, 27 L. J. Ch. 453.

(*z*) *Re Griffith*, 12 Ch. D. 655.

## PRELIMINARY OBSERVATIONS.

**Bankruptcy of partners and partnerships.**—Partners may become bankrupt either individually or collectively; and in some respects a division of the present branch of the law into two parts, relating, the one to the bankruptcy

<sup>1</sup>There being no uniform system of bankruptcy in the United States the cases upon this topic since the last American edition are few. The full consideration of the subject would seem, moreover, to belong to a professed treatise upon bankruptcy. The following cases upon this subject and insolvency have, however, been thought worthy of a place here:

Where, by a failing publicly to disclaim a printed statement that they were directors, and by allowing their neighbors to believe that they were in some manner interested in a bank, parties are estopped from denying their liability to those who trusted such bank, relying on their supposed connection with it, an appeal to a court of bankruptcy is not proper; as to declare such parties bankrupt would render them liable not only to those actually deceived, but to all having claims on the bank, whether deceived or not. And those who are actually deceived have a perfect remedy in the state courts. *In re Murry*, 13 Fed. Rep. 550.

The partnership cannot apply in its joint name for the benefit of the California insolvency act; and the right of the firm creditors to pursue partnership assets is not affected by insolvency proceedings in the case of one of the partners; in such case the assignees succeed only to the right of the insolvent. *California Furniture Co. v. Halsey*, 54 Cal. 315.

A firm may be adjudicated bankrupt so long as there are undistributed assets and partnership liabilities. The right of one partner to have the firm adjudicated bankrupt is co-extensive with the right of the firm creditors or of another partner. *In re Gorham*, 9 Biss. C. Ct. 23.

Partnership property as well as individual assets should be included in the schedule of a bankrupt. *In re Brick*, 4 Fed. Rep. 804.

Where one member of the firm files his petition in bankruptcy, scheduling the assets and liabilities of the firm, and also his individual assets and liabilities, the other

of an individual partner, and the other to the bankruptcy of a firm, would be as convenient as it would be simple. But the causes and consequences of the bankruptcy of an individual partner, and the causes and consequences of the

partner has a right to be made party to the proceedings, and to have the firm adjudged bankrupt on their own petition. *In re Gorham*, 9 Biss. C. Ct. 23.

It is the duty of the solvent partners, in case of the bankruptcy of one partner, to take possession of the firm assets, perform its contracts, extinguish its liabilities, and close up its business. And it is the right of the representatives of the bankrupt partner, unless there are peculiar circumstances exempting the particular case in equity from the general rule, to have an accounting, not only with respect to the completed business of the firm, but also as to the profits of all business unfinished at the dissolution but completed afterwards, and, at their option, to such as may be realized from new business entered into and carried on with the assets of the firm. *King v. Leighton*, 100 N. Y. 386; reversing S. C. 22 Hun, 419.

Where the debts against the firm have been compromised, and the firm dissolved, one partner has no right afterwards to put the firm into bankruptcy upon allegation of his own fraud in effecting a composition. *In re Hamlin*, 8 Biss. C. Ct. 122.

On the bankruptcy of one partner in a real estate business the assignee of the bankrupt and solvent partner have the same title, subject to the same rights and liabilities. It is necessary in such case to ad-

just the partnership dealings up to the time of the bankruptcy of one partner, and ascertain the exact interest of each at that time in the real estate. The solvent partner in such case will be protected as to the debts for which he is liable under the partnership as against the creditors of the bankrupt individually. *Thrall v. Crampton*, 9 Ben. 218.

The refusal or neglect by one of the partners to sign a petition for a composition, unless fraudulent, will not render the proceeding invalid as to the other partners, although it may well deprive one who fails to sign of all benefit of it. *In re Henry*, 9 Ben. 449.

The creditors of a partnership must prove their claims against the estate of the partners in bankruptcy, as required by the bankrupt law, if they would share in the distribution of their assets. *Daugherty v. Strauss*, 1 Tex. App. (Civ.) 508.

As to the rights of a non-resident creditor who does not prove his debt in insolvency under the general statute of Massachusetts (ch. 113, sec. 2. C. L. 11), as against the interest of the debtor in the assets of a copartnership, see *Maxwell v. Cochran*, 136 Mass. 73. See, also, *Maxwell v. Clark*, 139 Mass. 112.

As to the right of a bank to prove against the estate of the firm in insolvency for unpaid advances, and also for the amount of promissory notes of the firm to individual

bankruptcy of a firm of partners, are in so many respects the same that to consider them twice over would lead to useless repetition. With a view to avoid this, it is proposed in the present chapter to treat of the bankruptcy of partners

members thereof, given for advances made by them to the firm and assigned as collateral security to the bank, see *Miller Nat. Bk. v. Jefferson*, 138 Mass. 111.

As to when a copartner retiring from a firm may prove in bankruptcy against the estate of his copartner who has assumed the firm debts, see *In re Phelps*, 9 Ben. 286.

N. and L. were copartners under the name of N. & Co., and as such contracted debts and failed, having no assets. Subsequently they formed a new partnership under the name of N., agent, and failed, and were adjudged bankrupt, having firm assets. *Held*, that the creditors of N. & Co. were not entitled to share in the assets of the firm of N., agent, being excluded therefrom by the provisions of section 5121, Revised Statutes of the United States. *In re Nims*, 16 Blatchf. 439; reversing S. C. 10 Ben. 53.

It is necessary that all the members of a firm should be adjudged bankrupt in order that an assignee may deal with the joint property, and in order to enable a discharge of one partner to discharge him from the debts of the firm. *Crompton v. Conkling*, 9 Ben. 225.

Under some acts it has been held that, where partners severally file petitions in insolvency or bankruptcy, discharges of the individual partners are not operative against the firm debts. *Glenn v.*

*Arnold*, 56 Cal. 631; *Freeman v. Campbell*, 56 Cal. 639; S. C. 55 id. 197; *Daugherty v. Strauss*, 1 Tex. App. (Civ.) 508; *Trimble v. More*, 47 N. Y. Super. Ct. 340; *Honneger v. Wetterson*, 47 N. Y. Super. Ct. 125; *Poillon v. Lawrence*, 77 N. Y. 207.

Under other acts it is held otherwise. Thus, under the insolvency act of California of May 4, 1852, and the acts amendatory thereof and supplemental thereto, the discharge of one member of a firm from all his debts discharges him from all individual liability for debts of the firm. *Hawley v. Campbell*, 62 Cal. 442; *Dresbach v. v. Creditors*, 63 Cal. 187.

The discharge given by the New Jersey statute regulating assignments only becomes operative when all the property, individual as well as firm, has been assigned, and does not apply when the firm assets alone were transferred to the assignee. *Huggard v. Lehman*, 36 Hun (N. Y.), 307.

Where one person is a member of two firms, a discharge of one firm and its individual members from their debts will not relieve the common partner from debts owed as a member of the solvent firm. *Perkins v. Fisher*, 80 Ky. 11.

Where one of two former partners is under obligation to the other to pay a firm debt, his discharge in bankruptcy, though obtained in pursuance of the composition with his creditors, including

and partnerships under heads applicable to both, and to point out under each head those differences between the two which are of practical importance.

**Present bankruptcy law.**—The present law of bankruptcy is based on the Bankruptcy Act, 1883 (46 and 47 Vict. ch. 52), and the rules and orders of October, 1886, promulgated under its authority. The act does not extend to Scotland or Ireland except where expressly provided. (a) All the older bankruptcy acts are repealed, (b) and a new system of law has been substituted for them, based on the pre-existing law, and to a great extent preserving its principles and the practice under it; (c) but at the same time modifying it in many important respects, and rendering it \*necessary in all cases to examine the new [\*623] enactments before relying on earlier decisions. (d)

The statute does not apply to incorporated companies (§ 123); but it does to unincorporated companies empowered to sue and be sued by public officers. (e)

a creditor of the former firm, while it relieves him from his obligation to his former partner to pay the firm debt, does not discharge such former partner from liability for the unpaid balance of such debt; and a new promise by the bankrupt to his co-debtor, made pending the bankruptcy proceedings or afterwards to pay such balance, is binding. *Hill v. Trainer*, 49 Wis. 537.

A. retired from the firm, and B. executed to him a bond of indemnity against the firm debts. A creditor recovered judgment against both A. and B. B. was subsequently discharged in bankruptcy, and subsequently thereto A. paid the creditor a sum in settlement of the judgment. *Held*, that his claim against B. on the bond being provable under the bankrupt

act was barred by B.'s discharge. *Fisher v. Tiff*, 127 Mass. 313.

The debt of a firm is the debt of each of its members; therefore, after bankruptcy of a firm and its members, a new promise by one partner to pay a note of the firm given before bankruptcy is based on a good consideration, and is not a promise to pay the debt of another so as to fall within the statute of frauds. *Weatherly v. Hardman*, 68 Ga. 592.

As to the apportionment of costs between the partnership and separate estates, see *Re Blumer*, 12 Fed. Rep. 489.

(a) 46 and 47 Vict. ch. 52, § 2.

(b) *Id.* § 169.

(c) Bank. Rules, 1886, r. 353.

(d) See *Ex parte Griffith*, 23 Ch. D. 69.

(e) See Bank. Rules, 1886, r. 258.

Firms may proceed and be proceeded against in their mercantile names; but this rule does not apply to adjudications of bankruptcy. (*f*)

The statute enacts:

**Proceedings in partnership name.**—§ 115. Any two or more persons being partners, or any person carrying on business under a partnership name, may take proceedings or be proceeded against under this act in the name of the firm, but in such case the court may, on application by any person interested, order the names of the persons who are partners in such firm or the name of such person to be disclosed in such manner, and verified on oath, or otherwise as the court may direct. (*g*)

And the Bankruptcy Rules, 1886, contain the following further provisions on this subject:

**Attestation of firm signature.**—259. Where any notice, declaration, petition, or other document requiring attestation, is signed by a firm of creditors or debtors in the firm name, the partner signing for the firm shall add also his own signature, *e. g.*, “Brown & Co. by James Green, a partner in the said firm.”

**Service on firm.**—260. Any notice or petition for which personal service is necessary shall be deemed to be duly served on all the members of the firm if it is served at the principal place of business of the firm in England, on any one of the partners, or upon any person having at the time of service the control or management of the partnership business there.

**Debtors’ petition by firm.**—Where a firm of debtors file a declaration of inability to pay their debts, or bankruptcy petition, the same shall contain the names in full of the individual partners, and if such declaration or petition is signed in the firm name the declaration or petition shall be accompanied by an affidavit made by the partner who signs the declaration or petition, showing that all the partners concur in the filing of the same.

(*f*) See Bank. Rules, 1886, r. 264, firms dissolved before the proceedings are taken. See *Ex parte Young*, *infra*.

(*g*) This section does not apply to 19 Ch. D. 124.



**Receiving order against firm.**—261. A receiving order made against a firm shall operate as if it were a receiving order made against each of the persons who at the date of the order is a partner in that firm.

**Statement of affairs.**—263. In cases of partnership the debtors shall submit a statement of their partnership affairs, and each debtor shall submit a statement of his separate affairs.

**Adjudication against partners.**—264. No order of adjudication shall be made against a firm in the firm name, but it shall be made against the partners individually.

**\*Power of one partner to act for firm.**—The [\*624] power of one partner to act for the firm extends to proceedings in bankruptcy. (*h*)

One partner only need sign a petition by the firm for adjudication of bankruptcy against a debtor to it. (*i*) So one partner may prove a debt owing to the firm, and vote on behalf of the firm at meetings of creditors, (*k*) and, notwithstanding the general rule prohibiting one partner from binding the firm by deed, it has been decided that one partner may, by a power of attorney executed by him alone, authorize a third person to represent the firm in the above matters, and to prove and vote on its behalf accordingly. (*l*) One partner could under the old law bind the firm by signing the certificate of its bankrupt debtor. (*m*)

**Disabilities.**—On the other hand the Bankruptcy Act, 1883, prohibits the partner of a trustee from voting on questions relating to his remuneration (§ 88); nor can the partner of the registrar, official receiver, or other officer, do for him what he is prohibited by the act from doing him-

(*h*) 46 and 47 Vict. ch. 52, § 148.

(*k*) *Ex parte* Mitchell, 14 Ves.

(*i*) Bank. Rules, 1886, r. 259, etc., 597.

and form 10, note. See *Brickland v. Newsome*, 1 Camp. 474; *S. C. sub nomine*, *Buckland v. Newsome*, 1 Taunt. 477.

(*l*) *Ex parte* Mitchell, 14 Ves. 597, and *Ex parte* Hodgkinson, 19 Ves. 291–298.

(*m*) *Ex parte* Hall, 17 Ves. 62; *Ex parte* Fife, 2 M. & A. 577.

self (§ 116 (2) ); nor can any one vote for any remuneration to his partner any more than to himself (sched. 1, r. 26); nor can an affidavit be sworn before the partner of a solicitor before whom it could not be sworn (Bankruptcy Rules, 1886, r. 56 (2) ).

**Distinctions between traders and non-traders.**—Under the present law all persons capable of contracting debts, whether traders or non-traders, can be adjudicated bankrupt. (*n*) The differences formerly existing between these two classes of debtors are no longer important; except [\*625] that the \*doctrines of reputed ownership are confined to traders and persons in business. (*o*)

**Petition for receiving order.**—In order that a debtor may be adjudicated bankrupt he must have committed an act of bankruptcy, and he himself or some creditor must petition for a receiving order against him. (*p*)

It is not the object of the present treatise to expound the law of bankruptcy, except so far as it is a branch of the law of partnership; and having made the foregoing general observations, it is proposed to advert only to those matters which relate more particularly to partners; the reader being referred to works on bankruptcy for further information on this subject.

(*n*) 46 and 47 Vict. ch. 52, § 4. 1886, r. 271; *Re Lee*, 23 Ch. D. 216; *Re James*, 12 Q. B. D. 332; *Ex parte Cahen*, 10 Ch. D. 183. Persons having privilege of parliament are not exempt. § 32. As to aliens, see § 6 (1) (*d*), *Ex parte Crispin*, 8 Ch. 374; and as to foreign members of English firms, *Ex parte Blain*, 12 Ch. D. 522. As to married women, § 152, and 45 and 46 Vict. ch. 75, § 1, cl. 5; *Ex parte Coulson*, 20 Q. B. D. 249; *Re Gris-sell*, 12 Ch. D. 484. As to infants, see *Ex parte Jones*, 18 Ch. D. 109. As to lunatics, § 148; Bank. Rules, 1886, r. 271; *Re Lee*, 23 Ch. D. 216; *Re James*, 12 Q. B. D. 332; *Ex parte Cahen*, 10 Ch. D. 183. which, however, was on the act of 1869.

(*o*) 46 and 47 Vict. ch. 52, § 44 (3). As to persons who have ceased to trade, see *Dawe v. Vergara*, 11 Q. B. D. 241, but note this was not a decision on this enactment.

(*p*) 46 and 47 Vict. ch. 52, § 5, and forms 4 and 10 to rules of 1886.

## SECTION I.—ADJUDICATIONS OF BANKRUPTCY AGAINST PARTNERS.

1. *As to acts of bankruptcy.*

**Acts of bankruptcy.**—Nothing is an act of bankruptcy which is not declared to be so by statute. (*q*) Moreover an act of bankruptcy is a personal act or default, and is not to be imputed to any one on the ground of agency. (*r*) Consequently an act of bankruptcy committed by one partner cannot be regarded as an act of bankruptcy committed by the firm. (*s*)

The acts or defaults which are acts of bankruptcy are stated in the Bankruptcy Act, 1883, section 4, which is as follows:

§ 4. (1) A debtor commits an act of bankruptcy in each of the following cases:

- (a) If in England or elsewhere he makes a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally:
- (b) If in England or elsewhere he makes a fraudulent conveyance, gift, delivery or transfer of his property, or of any part thereof:
- \*(c) If in England or elsewhere he makes any conveyance or [\*626] transfer of his property or any part thereof, or creates any charge thereon which would under this or any other act be void as a fraudulent preference if he were adjudged bankrupt:
- (d) If with intent to defeat or delay his creditors he does any of the following things, namely, departs out of England, or being out of England remains out of England, or departs from his dwelling-house, or otherwise absents himself, or begins to keep house:
- (e) If execution issued against him has been levied by seizure and sale of his goods under process in an action in any court, or in any civil proceeding in the high court: (*t*)
- (f) If he files in the court a declaration of his inability to pay his debts or presents a bankruptcy petition against himself:

(*q*) See 15 Ves. 462, and 17 id.      (*s*) *Ibid.*

198.      (*t*) Purchasers from the sheriff

(*r*) *Ex parte* Blain, 12 Ch. D. 522. are protected by § 46 (3).

And see *infra*.

(g) If a creditor has obtained a final judgment against him for any amount, and, execution thereon not having been stayed, (u) has served on him in England, or, by leave of the court, elsewhere, a bankruptcy notice under this act, requiring him to pay the judgment debt in accordance with the terms of the judgment, or to secure or compound for it to the satisfaction of the creditor or the court, and he does not, within seven days after service of the notice, in case the service is effected in England, and, in case the service is effected elsewhere, then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice, or satisfy the court that he has a counterclaim, set-off or cross-demand which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained: (x)

(h) If the debtor gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts.

(2) A bankruptcy notice under this act shall be in the prescribed form, and shall state the consequences of non-compliance therewith, and shall be served in the prescribed manner. (y)

Almost all the foregoing acts of bankruptcy have been made the subject of discussion and judicial decision. [\*627] In this place, \*however, it is only proposed to notice those which relate to fraudulent transfers of property.

**Fraudulent conveyances, etc.**—A transfer of property is not an act of bankruptcy, unless it is intended to pass the ownership in the thing transferred; a mere removal of property is not an act of bankruptcy. (z)

(u) See *Re Ide*, 17 Q. B. D. 755. Judgment against a firm is not a judgment against a member until execution against him can be issued. See Jud. Rules, 1883, Ord. xlii, r. 10. An interpleader order that the sheriff withdraw is a stay. *Ex parte Ford*, 18 Q. B. D. 369. A judgment against a married woman's separate estate is not within § 4 (g). See *Ex parte Coulson*, 20 Q. B. D. 249.

D. 113, a notice given by a solvent partner and his copartner, against whom a receiving order had been made, was held good. A valid notice may be given by the liquidator of a company being wound up. *Ex parte Winterbottom*, 18 Q. B. D. 446.

(y) See Bank. Rules, 1886, Appx., form 6.

(z) *Isitt v. Beeston*, L. R. 4 Ex. 159.

(x) In *Ex parte Owen*, 13 Q. B.

Notwithstanding the omission from clause *b* of section 4 of the words, "with intent to defeat or delay his creditors," the fraud referred to is a fraud upon creditors, and not upon other persons; (*a*) and such fraud must be proved as a matter of fact. But it seems to be settled that where a person without any actual fraud conveys all his property to secure a past debt he commits an act of bankruptcy. (*b*) As the necessary consequence of such a conveyance is to defeat or delay creditors, it is said that an intent to defeat or delay them must be inferred; and that such a conveyance must be fraudulent, or must at all events be treated as if it were fraudulent. This reasoning is not altogether satisfactory. (*c*) It is, however, probably safe to say that under the present law, as under the previous statutes, a conveyance or assignment by a debtor of all, or substantially all, (*d*) his property, either in satisfaction of, (*e*) or as a security for, (*f*) a debt previously contracted, is an act of bankruptcy, unless made pursuant to an agreement entered into when the debt was contracted; (*g*) although the conveyance or assignment\* is made *bona fide* and under pressure from [\*628]

(*a*) *Re Wood*, 7 Ch. 302; *Ex parte Cohen*, id. 20. enforced, it would have stopped the assignor's trade.

(*b*) *Ibid.*

(*e*) *Siebert v. Spooner*, 1 M. & W. 714.

(*c*) See *Ex parte Mercer*, 17 Q. B. D. 290, where *Freeman v. Pope*, 5 Ch. 538, is observed upon. (*f*) *Ex parte Payne*, 11 Ch. D. 539, where there was forbearance.

(*d*) *Re Wood*, 7 Ch. 302; *Ex parte Hawker*, id. 214; *Ex parte Cohen*, id. 20; *Ex parte Foxley*, 3 Ch. 515; *Ex parte Bailey*, 3 De G. M. & G. 534; *Ex parte Bland*, 6 id. 757; *Stanger v. Wilkins*, 19 Beav. 626. Compare *Smith v. Timms*, 1 H. & C. 849, where it was held that a *bona fide* assignment by a trader of all his property, with a small but not a colorable exception, was not an act of bankruptcy. See, also, *Young v. Waud*, 8 Ex. 221, where the assignment was upheld, though, if

*Re Wood*, 7 Ch. 302; *Ex parte Cohen*, id. 20; *Ex parte Hawker*, id. 214; *Lindon v. Sharp*, 6 Man. & Gr. 895; *Oriental Banking Co. v. Coleman*, 3 Giff. 11; *Turner v. Hardcastle*, 11 C. B. N. S. 683.

(*g*) *Ex parte Izard*, 9 Ch. 271. If the agreement is not to take effect until the debtor gets into difficulties, the agreement will not protect the transaction. See *Ex parte Fisher*, 7 Ch. 636; *Ex parte Burton*, 13 Ch. D. 102; *Ex parte Kilner*, id. 245; *Ex parte Bolland*, 8 id. 230.

the creditor; (h) and although the creditor does not know that he is taking all his debtor's property. (i) A conveyance or assignment of part only of a debtor's property is also an act of bankruptcy if it is void under section 48 as amounting to a fraudulent preference. (k) That section is as follows:

**Avoidances of preferences in certain cases.**—§ 48. (1) Every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favor of any creditor, or any person in trust for any creditor, with a view of giving such creditor a preference over the other creditors, shall, if the person making, taking, paying or suffering the same is adjudged bankrupt on a bankruptcy petition presented within three months after the date of making, taking, paying or suffering the same, be deemed fraudulent and void as against the trustee in the bankruptcy. (l)

(2) This section shall not affect the rights of any person making title in good faith and for valuable consideration through or under a creditor of the bankrupt.

This section does not avoid as a fraudulent preference a conveyance or transfer of property unless three things concur, viz.: 1st. The conveyance, etc., must be made by a person unable to pay his debts as they become due. 2d. It

(h) *Re Wood*, 7 Ch. 302; *Jones v. Harber*, L. R. 6 Q. B. 77; *Woodhouse v. Murray*, L. R. 4 Q. B. 27; *Newton v. Chantler*, 7 East, 138; *Smith v. Cannan*, 2 E. & B. 35; *Leake v. Young*, 5 id. 955; *Stanger v. Wilkins*, 19 Beav. 626.

(i) *Smith v. Cannan*, 2 E. & B. 35.

(k) See section 4 (c), which settles the point raised in *Ex parte Halliday*, 8 Ch. 283, and *Ex parte Norton*, 16 Eq. 397.

(l) N. B.—The section does not enable other persons to invalidate such transactions. *Willmott v. London Celluloid Co.* 31 Ch. D. 425, and 34 id. 147; *Ex parte Cooper*, 10 Ch. 510.

Section 47 of the Bankruptcy Act, 1883, does not apply to the administration by the court in bankruptcy of the estate of a deceased insolvent, under section 125 of that act. *Ex parte Official Receiver, Re Gould*, 19 Q. B. D. 92. Still less does section 47 apply to ordinary administration actions in the high court. The Judicature Act, 1875, section 10, does not render it so applicable. Similar observations apply to the group of sections 43–48 of the Bankruptcy Act, 1883. See the judgments in the same case.

must be made with a view of giving a creditor a preference over others. 3dly. It must be made within three months of the bankruptcy petition. As regards the second requisite, a conveyance, etc., made spontaneously by the debtor and without any demand or pressure from the creditor, or even in willing compliance with such a demand, is deemed to be made with a view of giving a \*pref- [\*629] erence, (m) unless the evidence shows that it was made with some other view. (n) And even if there is pressure a conveyance or payment to a class of creditors, or to a trustee for them, is within the section. (o)

**Sales, etc., for present consideration.**—On the other hand, a sale or mortgage by a debtor of all his property for a present advance, made *bona fide* to enable him to carry on his business, is not an act of bankruptcy; (p) although the purchaser may be a creditor and may only pay the difference between the purchase money and what is owing to him. (q) So the *bona fide* giving security for present or future advances agreed to be made, (r) or for

(m) See, on this section, *Ex parte* Griffith, 23 Ch. D. 69; *Ex parte* Hill, id. 695; *Ex parte* Pearson, 8 Ch. 667; *Ex parte* Topham, id. 614; *Ex parte* Bolland, 7 Ch. 24; *Ex parte* Tempest, 6 Ch. 70, affirming *Ex parte* Craven, 10 Eq. 648, as to the distinction between acts which are voidable on the ground of fraudulent preference, and acts which are avoided by reason of the relation back of the trustee's title. Marks v. Feldman, L. R. 5 Q. B. 275.

(n) See *Ex parte* Taylor, 18 Q. B. D. 295, where the object was to avoid a criminal prosecution. See, also, *Ex parte* Mercer, 17 id. 290.

(o) *Ex parte* Saffery, 4 Ch. D. 555, affirmed 3 App. Ca. 213, *sub. nom.* Tonikins v. Saffery.

(p) *Ex parte* Reed and Steel, 14 Eq. 586; *Baxter v. Pritchard*, 1 A. & E. 456; *Lee v. Hart*, 11 Ex. 880, and 10 Ex. 555. In each of these cases the seller contemplated bankruptcy, but the purchaser acted *bona fide*. See, as to mortgages, *Re Colemere*, 1 Ch. 128.

(q) *Ex parte* Norton, 16 Eq. 397; *Bell v. Simpson*, 2 H. & N. 410; *Pennell v. Dawson*, 18 C. B. 355; *Pennell v. Reynolds*, 11 id. N. S. 709. Compare *Graham v. Chapman*, 12 C. B. 85, where the advance was itself included in the assignments. This case, however, cannot now be relied upon. See the above cases, and *Lomax v. Buxton*, L. R. 6 C. P. 107.

(r) *Ex parte* Dann, 17 Ch. D. 26; *Ex parte* Wilkinson, 22 id. 788.

any other advantage, *e. g.*, an agreement to give time, (s) is not an act of bankruptcy, although the security may comprise all the borrower's property, (t) and cover [\*630] an antecedent debt. (u) Still less does \*a person commit an act of bankruptcy by *bona fide* conveying or assigning part of his property in payment of, or as a security for, a debt in respect of which he is being pressed; (x) and notwithstanding section 4, clause 1 (a), it is apprehended that a *bona fide* assignment of part of his property upon trust for sale and payment of all his debts is not an act of bankruptcy. (y)

**Protected transactions.**—In connection with this subject it is important to observe the clause at the end of section 48, protecting persons making title in good faith and for valuable consideration through a creditor of the bankrupt, (z) and also section 49, which relates to dealings with the bankrupt himself without notice of any act of bankruptcy. This section will be referred to more at length

(s) As in *Philps v. Hornstedt*, 1 Ex. D. 62, affirming S. C., L. R. 8 Ex. 26. Compare *Ex parte Wood*, 10 Ch. D. 313; *Woodhouse v. Murray*, L. R. 4 Q. B. 27.

(t) *Hutton v. Crutwell*, 1 E. & B. 15; *Bittlestone v. Cooke*, 6 E. & B. 296; *Harris v. Rickett*, 4 H. & N. 1. But see *Ex parte Sparrow*, 2 De G. M. & G. 907. A *bona fide* mortgage of part of a trader's property is clearly not an act of bankruptcy. See *Mather v. Fraser*, 2 K. & J. 536.

(u) *Ex parte Izard*, 9 Ch. 271; *Ex parte Hodgkin*, 20 Eq. 746; *Allen v. Bonnett*, 5 Ch. 577; *Pennell v. Reynolds*, 11 C. B. N. S. 709; *Shrubsole v. Sussams*, 16 id. 452. Compare *Ex parte Fisher*, 7 Ch. 636, where the present advance was made to obtain security for a past debt.

(x) *Ex parte Craven*, 10 Eq. 648, and under the name *Ex parte Tempest*, 6 Ch. 70; *Ex parte Bolland*, 7 Ch. 24; *Crosby v. Crouch*, 11 East, 256; *Young v. Waud*, 8 Ex. 221; *Hale v. Allnutt*, 18 C. B. 505; *Strachan v. Barton*, 11 Ex. 647, where the debt had not been payable. See, too, *Belcher v. Prittie*, 10 Bing. 403; *Bannatyne v. Leader*, 10 Sim. 350; *Johnson v. Fesenmeyer*, 25 Beav. 88, and 3 De G. & J. 13.

(y) *Bannatyne v. Leader*, 10 Sim. 350; *Berney v. Davison*, 1 Brod. & B. 408; *Berney v. Vyner*, id. 482. But an attempt to prefer some creditors to others is clearly void. *Ex parte Saffery*, 4 Ch. D. 555, and 3 App. Ca. 213.

(z) *Ante*, p. 628.



hereafter (*infra*, s. 2). This protecting clause applies to the unsolicited payment of a debt if the creditor accepts payment *bona fide* in the ordinary course of business, and in ignorance of any available act of bankruptcy of his debtor. (a) *A fortiori* the clause applies to a return under pressure of goods not paid for. (b)

**Fraudulent preference by trustees.**—Moreover a debtor who is a trustee, and who gives to his *cestui que trust* or sets apart for him that which in equity is his, does not commit an act of bankruptcy; and although the gift or setting apart may have been made in immediate contemplation of bankruptcy, it cannot be deemed a fraudulent preference. (c)

**Effect of lapse of three months after the conveyance.**—In order that a conveyance or assignment may be an act of bankruptcy it must be made within three months before \*the presentation of the petition. (d) But al- [\*631] though more than three months may have elapsed since an assignment was made, it may be impeached for fraud under the statute of 13th Elizabeth, chapter 5; (e) or be invalidated by the relation back of the title of the trustees. (f)

**Conveyances, etc., by partners.**—The foregoing doctrines are of considerable importance to partners; for even

(a) See under the old law, *Butcher v. Stead*, L. R. 7 H. L. 839; *Ex parte Hodgkin*, 20 Eq. 746.

(b) *Ex parte Topham*, 8 Ch. 614; *Ex parte Blackburn*, 12 Eq. 358.

(c) See *Ex parte Taylor*, 18 Q. B. D. 295; *Ex parte Kelly & Co.* 11 Ch. D. 306; *Edwards v. Glyn*, 2 E. & E. 29; *Sinclair v. Wilson*, 20 Beav. 324; *Gardner v. Rowe*, 2 Sim. & Stu. 346.

(d) § 6 (c).

(e) See, as to this, *Ex parte Chaplin*, 26 Ch. D. 319; *Ex parte Games*, 12 Ch. D. 314; *Allen v. Bonnett*, 5

Ch. 577; *Marks v. Feldman*, L. R. 5 Q. B. 275; *Jones v. Harber*, L. R. 6 Q. B. 77; *Hassel v. Simpson*, 1 Bro. C. C. 99, better reported in 1 Dougl. 89, note, under the name of *Hassells v. Simpson*; *Pulling v. Tucker*, 4 B. & A. 382; *Ex parte Sparrow*, 2 De G. M. & G. 907; *Ex parte Taylor*, 5 id. 392; *Oswald v. Thompson*, 2 Ex. 215; *Ex parte Thomas*, De G. 612; *Ex parte Jackson*, id. 609.

(f) Under § 43 of the act. See *infra*, § 2.

if an assignment is intended to be executed by all the partners, and it is in fact executed by one of them only, still its execution by that one may be an act of bankruptcy on his part. (*g*) Moreover, if all the partners execute the deed, and one of them only becomes bankrupt, the deed is avoided as to all of them. (*h*) Again, if partners assign all their property to a person who undertakes to pay their debts, they thereby commit an act of bankruptcy. (*i*) So, if partners have resolved to stop payment, and they give checks to particular creditors with a view to prefer them, that amounts to a fraudulent preference and an act of bankruptcy on the part of the firm, (*k*) unless the payments are protected under section 49, already noticed.

**Conveyance by one partner in trust for creditors of firm.**—But a conveyance by one partner of all his separate property to a trustee, upon trust for sale and payment of the debts of the firm, is not an act of bankruptcy if made *bona fide* for the purpose of relieving the firm from its difficulties, and of enabling it to carry on its business, and if it is not made for the purpose of, and has not in fact the effect of, defrauding the separate creditors of the [\*632] assignor. (*l*) And it is apprehended \*that a conveyance by a firm of all its joint estate would not be an act of bankruptcy if the separate creditors of the partners were not prejudiced. (*m*) But a mortgage of joint estate in favor of separate creditors will be a fraud on the joint creditors, and therefore an act of bankruptcy if the joint estate is insolvent; (*n*) and a mortgage by a partner of his separate estate in favor of joint creditors would, it

(*g*) See *Bowker v. Burdekin*, 11 M. & W. 128.

(*h*) See *Ex parte Addison*, 3 Mon. & A. 434.

(*i*) *Ex parte Zwilchenbart*, 3 M. D. & D. 671. See, too, *Turquand v. Vanderplank*, 10 M. & W. 180.

(*k*) *Ex parte Simpson*, De Gex, 9; *Bevan v. Nunn*, 9 Bing. 107.

(*l*) *Abbott v. Burbage*, 2 Bing. N. C. 444. And see *Berney v. Davison*, 1 Brod. & B. 408, and *Berney v. Viner*, id. 482, and the next note.

(*m*) See as to this, § 4, cl. 1 (*a*), and *Ex parte Saffery*, 4 Ch. D. 555.

(*n*) *Ex parte Snowball*, 7 Ch. 534.

is apprehended, be equally invalid if it prejudiced his separate creditors.

**Conveyances from one partner to another.**—An ordinary conveyance or assignment by one partner to another is not (with reference to the present subject) distinguishable from any other conveyance or assignment. But as each partner has a lien on the partnership property for what is due from the firm to him as a partner, it has been held that a *bona fide* assignment by one partner of all his share and interest in the partnership assets to his copartner, upon trust, first, to pay the partnership debts, secondly, to retain what is due to himself from the firm, and thirdly, to divide the surplus between the partners, does not constitute an act of bankruptcy on the part of the assignor, although he may have had little other property than that comprised in the assignment. (*o*) Such an assignment does not, in fact, do more than enable the assignee to work out the lien which he had previously to, and independently of, the assignment, and is not within the words of section 4, clause 1 (*a*).

**Rules as to joint adjudications.**—In order to sustain a joint adjudication against two or more persons it is necessary that some act of bankruptcy shall have been committed by each of them. (*p*) But it is not requisite that they should all have committed an act of bankruptcy of the same kind. Thus, it will be sufficient if one has departed the realm with intent to defraud his creditors, and another has kept his house to avoid them, and a third has lain in gaol for debt, and so on. (*q*) But if a joint act of bankruptcy is relied \*upon, all the partners [\*633] must be proved to have concurred in it. (*r*)

**Act of bankruptcy committed by one partner only.**—An act of bankruptcy committed by one partner will not

(*o*) See *Payne v. Hornby*, 25 Beav. 280, where the assignor was a surviving partner, and the assignee the executor of his deceased partner. *Mills v. Bennett*, 2 M. & S. 556; *Allen v. Hartley*, 4 Doug. 20; *Dutton v. Morrison*, 17 Ves. 193; *Hogg v. Bridges*, 8 Taunt. 200.

(*q*) *Watson on Part.* 248.

(*p*) *Beasley v. Beasley*, 1 Atk. 97; (*r*) See the cases in the next note.

amount to an act of bankruptcy on the part of his copartners, unless it can be shown to have been, in point of fact, their act as well as his. The case of *Mills v. Bennett* (s) is a strong instance of this; there one of three bankers resided at the bank, and alone conducted the business of the firm, his copartners residing at a distance. The resident and acting partner absented himself from the bank, shut it up, and stopped payment, and it was held that this was not sufficient to support a joint adjudication against the three partners.

**Time of commission of the act of bankruptcy.**—In order to support a joint adjudication against all the members of a firm each must have committed an act of bankruptcy during the continuance of a joint debt. (t)

**Dormant partners.**—A dormant partner may be either included in an adjudication against the firm, (u) or be adjudged bankrupt on a petition against him separately. (x) The same, it is apprehended, is true of nominal partners. (y)

## 2. *The petitioning creditor's debt.*

**Who may petition.**—The petitioning creditor may be an ordinary individual, or a company empowered to sue and be sued by a public officer, (z) or a corporation, (a) *e. g.*, a registered company. (b)

An unincorporated company may petition against one of

(s) 2 M. & S. 556. See, too, *Ex parte* Blaine, 12 Ch. D. 522; *Ex parte* Mavor, 19 Ves. 543; *Ex parte* Addison, 3 De G. & S. 580.

(t) See *Ex parte* Bamford, 15 Ves. 449; *Ex parte* Dewdney, *id.* 495.

(u) As in *Ex parte* Lodge and Fendal, 1 Ves. Jr. 166.

(x) As in *Ex parte* Hamper, 17 Ves. 403.

(y) *Ex parte* Murton, 1 M. D. & D. 252, is an example of an adjudication against a firm of two, one

of whom was only liable to third persons, in consequence of his having held himself out as a partner.

(z) Bank. Rules, 1886, rule 258. As to the old law, see *Guthrie v. Fisk*, 3 B. & C. 178. As to the mode of describing him, see *Ex parte* Torkington, 9 Ch. 298.

(a) 46 and 47 Vict. ch. 52, § 168, "Person." *Ex parte* Collins, De Gex, 381; *Ex parte* Sneyds, 1 Moll. 261.

(b) *Re* Calthrop, 3 Ch. 252.

its shareholders. (*c*) So the trustee of a friendly society may \*petition against a member in respect [\*634] of a debt owing by the member to the society. (*d*)

If a single individual petitions, the debt in respect of which he petitions must be owing to him solely, and not to him and others jointly. (*e*) When, however, a firm petitions, the petition need only be signed by one of the partners. (*f*) If one member of a firm is bankrupt his trustee should be a co-petitioner with the solvent partners. (*g*)

**Amount of petitioning creditor's debt.**—The amount of the debt due to the petitioning creditor or creditors must be 50*l.* at least; (*h*) and if the debt is secured the security must be given up, or its value must be estimated and deducted, and the petitioner must give it up, if required, at its estimated value. (*i*) A debt, however, of 50*l.* bought up for less than that sum is sufficient in amount. (*k*)

**Nature of debt.**—By the Bankruptcy Act, 1883, section 6, clause 1 (*l*), the petitioning creditor's debt must be a liquidated sum payable either immediately or at some certain future time.

A debt proved under a former bankruptcy will support a second adjudication, the object of which is to impeach transactions not impeachable under the first. (*l*)

**Circumstances which preclude a creditor from petitioning.**—Even where a person is a creditor to a sufficient amount, where his debt has accrued at the proper time, and where the debtor has committed an act of bankruptcy, there may be circumstances which preclude the creditor from obtaining adjudication against his debtor. For ex-

(*c*) See *Ex parte* Hall, Mon. & Ch. 365. in support, see rules 149 to 151, and form 12.

(*d*) *Hope v. Meek*, 10 Ex. 829.

(*g*) *Ex parte* Owen, 13 Q. B. D.

(*e*) *Buckland v. Newsame*, 1 Taunt. 477.

113.

(*h*) 46 and 47 Vict. ch. 52, § 6 (1, *a*).

(*f*) 46 and 47 Vict. ch. 52, § 115, and form 10 in Sched. to the Bank.

(*i*) *Id.* § 6 (2).

Rules, 1886; and as to the affidavit

(*k*) *Doe v. Ingelby*, 14 M. & W.

91.

(*l*) *Ex parte* Wieland, 5 Ch. 486.

ample, the creditor may be an alien enemy, as where, though a British subject, he is residing and trading in an enemy's country without license; (*m*) or the creditor may rely on an act of bankruptcy to which he has himself been privy, as where the debtor has assigned all his property in trust for his creditors, and the petitioner is a creditor who is bound by such assignment; (*n*) in such cases as these an adjudication at his instance cannot be supported.

**Petition by one partner against another.**—A partner who is a creditor of his copartner may petition for and obtain a receiving order against his copartner. (*o*) This is clear from many cases, of which *Ex parte Motley* (*p*) may be taken as a type. There the petitioning creditor had lent the bankrupt a sum of money upon the terms of receiving interest at 5*l.* per cent., and a share in the net profits of the bankrupt's business, so long as the principal remained unpaid; repayment of the principal and interest was secured by a bond and a judgment. The principal so lent, together with some arrears of interest thereon, constituted the petitioning creditor's debt, and it was held sufficient; for although the borrower and the lender were liable to strangers as if they were partners, the debt in question had nothing to do with the partnership accounts, and might have been recovered by action at law. Again, in *Ex parte Richardson*, (*q*) two brothers, *Henry* and *William*, had been partners, and had dissolved partnership. On the dissolution the accounts were taken, and the firm was found debtor to *William* in 1,000*l.* and upwards. *Henry* continued the business without paying off what was due to his brother, and borrowed from him from time to time other moneys, which were placed to *William's* credit in his account with

(*m*) *McConnell v. Hector*, 3 Bos. Paterson, 2 Rose, 466; *Ex parte Nokes*, and *Ex parte Maberley*, 1

(*n*) *Ex parte Payne*, De Gex, 534. Mont. on Part. note N. p. 62.

(*o*) See, in addition to the cases (*p*) 1 Mon. & Ayr. 46.  
noticed in the text, *Windham v.* (*q*) 3 D. & Ch. 244.

the late firm. *William* petitioned for an adjudication against *Henry*, and was held to have a sufficient debt. (*r*)

But, in order that a debt may be sufficient to support a petition for a receiving order, the debt must be one to which there is no equitable defense. This was so under the previous statutes, as is shown by *Ex parte Gray*, (*s*) where the petitioner was not the creditor partner himself, but his trustee. *Hodges* \*and *Gray* were partners. [\*636] *Hodges* had brought in 1,000*l.* as his share of the partnership capital, and had lent *Gray* 1,000*l.*, which he brought in as his share. *Gray* had covenanted with *Hodges* to repay him this sum with interest; and, as a further security, *Gray* had executed a mortgage to a trustee for *Hodges*, and had covenanted with the trustee to pay him the same sum, with interest. *Hodges* had filed a bill for a dissolution of partnership, and for an account. His trustee then petitioned for, and obtained an adjudication of bankruptcy against *Gray*; but the adjudication was annulled, on the ground that *Hodges*, having filed a bill for an account, would not have been allowed to sue for the 1,000*l.* at law, and that his trustee was in no better position than himself.

**Improper petitions by one partner against his copartner.**—In connection with this subject it may be observed that under the older statutes, although one partner might have obtained an adjudication of bankruptcy against his copartner, still, if it appeared that the real object of the petitioner was to dissolve the partnership, and that an adjudication of bankruptcy was not required for any other purpose, the adjudication would be annulled. (*t*) So it would if it had been obtained on the petition of a creditor

(*r*) In this case there was a sufficient debt irrespectively of the balance found due to William on the dissolution, but the brothers treated the loans made subsequently as if made to the late firm.

*Ex parte* Page, 1 Gl. & Jam. 100; *Hope v. Meek*, 10 Ex. 842.

(*s*) 2 Mon. & A. 283. See, also,

(*t*) *Ex parte* Christie, Mont. & Bl. 314; *Ex parte* Browne, 1 Rose, 151; *Ex parte* Johnson, 2 M. D. & D. 678; *Ex parte* Phipps, 3 id. 505. But see *Ex parte* Uphill, 1 Ch. 439.

acting at the instigation of one of the partners; and whether the adjudication was against the whole firm, or one only of its members, was immaterial. (*u*) It is apprehended that under the Bankruptcy Act, 1883, the court will also dismiss a petition or annul a receiving order on similar grounds. (*x*)

[\*637] \*3. *Of joint and separate adjudications.*

**Joint debt will support a separate adjudication.**—A debt owing by one partner only will not support a joint adjudication against him and his copartners; (*y*) but a debt owing by all the partners of a firm is sufficient to support an adjudication against any one or more of them; (*z*) and probably a debt owing by several persons jointly will support an adjudication against any one or more of them, although they may not be all the members of a firm, or indeed partners at all. (*a*)

Where a receiving order is made against a firm the joint and separate creditors are collectively convened to the first meeting of creditors. (*b*) The trustee appointed by the joint creditors is the trustee of the separate estates. (*c*) If two or more members of a firm constitute a separate and

(*u*) See, in addition to the cases just cited, *Ex parte* Hall, 3 Deac. 405; *Ex parte* Bourne, 2 Gl. & J. 137; *Ex parte* Harcourt, 2 Rose, 214, 215; *Ex parte* Gallimore, id. 434. In *Ex parte* Nash, 12 Jur. 494, *Ex parte* Parkes, 3 Deac. 31, and *Ex parte* Wilbran, *alias* Wilbeam, 5 Madd. 1, and Buck, 459, the court refused to supersede the commission, not being satisfied that it had been obtained with an improper object. See, also, *Ex parte* Uphill, 1 Ch. 439.

(*x*) See *Ex parte* Griffin, 12 Ch. D. 480; *Ex parte* Harper, 20 id. 685. As to annulling on equitable grounds, see *Ex parte* Claxton, 7

Ch. 532; and as to injunctions to restrain proceedings in bankruptcy, see *Attwood v. Banks*, 2 Beav. 192; *Perry v. Walker*, 1 Y. & C. C. 672; *Pim v. Wilson*, 2 Ph. 653.

(*y*) See *Ex parte* Clarke, 1 D. & C. 544.

(*z*) 46 and 47 Vict. ch. 52, § 110. See, as to members of companies empowered to sue and be sued by public officers, *Davison v. Farmer*, 6 Ex. 242, overruling *Ex parte* Wood, 1 M. D. & D. 92.

(*a*) See *Ex parte* Chambers, 2 M. & A. 440.

(*b*) Bank. Rules, 1886, r. 265.

(*c*) Id. r. 268.



independent firm the creditors of such firm are deemed to be a separate set of creditors, and are on the same footing as the separate creditors of any individual member of the firm. (*d*)

**Partners who may be adjudicated bankrupt.**—Partners who are dormant or who are nominal merely may be adjudicated bankrupt. (*e*) But there seems to be a difficulty in supporting a joint adjudication against several partners, one of whom is dormant and is only entitled to a share of the profits; for in such a case there is no joint property to administer. (*f*) Where all the partners save one are dead the survivor can be made bankrupt; and although all the joint property may in one sense be vested in him by survivorship, a petition filed against him alone before his co-partners died will not be superseded in favor of a petition filed against him alone since their death. (*g*)

**\*Effect of death of a partner.**—Where a debtor [\*638] by or against whom a bankruptcy petition has been presented dies, the proceedings are continued as if he were alive, unless the court otherwise orders; (*h*) and if, after the filing of a petition against several persons, one of them dies, an adjudication may be made against the survivors; or if an adjudication has already been made against them and the deceased it will be amended. (*i*)

**Cases of two firms with common partners.**—Where there are two distinct firms, a major and a minor firm, a creditor of the latter only may obtain a joint adjudication against all the persons who compose it, although their co-partners in the major firm cannot be included in the same

(*d*) Id. r. 269.

(*e*) See *Ex parte Matthews*, 3 V. & B. 125; *Ex parte Hamper*, 17 Ves. 403. Dormant partners may be omitted. See *Ex parte Benfield*, 5 Ves. 424.

(*f*) See *Ex parte Hamper*, 17 Ves. 403.

(*g*) *Ex parte Smith*, 5 Ves. 295.

(*h*) 46 and 47 Vict. ch. 52, § 108. This does not apply to debtors who die before they are served. *Ex parte Hill and Hymans*, 19 Q. B. D. 538.

(*i*) See *Ex parte Hall, De Gex*, 332.

adjudication. (*j*) If, however, the major firm is adjudicated bankrupt, this involves the bankruptcy of the minor firm; and its creditors can, therefore, obtain payment of their debts under the adjudication against the major firm, although they could not have procured such adjudication. (*k*)

**Concurrent adjudications.**—Formerly it was the practice for the creditor of a firm of several partners to take out separate commissions against each partner, as well as a joint commission against the whole firm; the object being to distribute the assets of the firm under the joint commission, and the separate assets of each partner under the separate commission issued against him. (*l*) The modern practice, however, is different; for now, under a joint adjudication against a firm, not only are the assets of the firm distributed amongst its joint creditors, but the separate assets of each partner are also distributed amongst his own separate creditors. (*m*) Under a joint adjudication, therefore, everything can be done as fully and effectually as under separate adjudications against all the mem-  
[\*639] bers; and more can be done \*than under separate adjudications against some only of them. For these, amongst other reasons, a joint creditor seldom or never now thinks of petitioning for separate adjudications against all the partners. If he is desirous of making them all bankrupt he petitions for a joint adjudication against the firm. (*n*)

(*j*) *Ex parte* Chambers, 2 Mont. & A. 440, and *Bernasconi v. Fairbrother*, id. 441. See id. 472.

(*k*) *Ex parte* Worthington, 3 Madd. 26. See Bank. Rules, 1886, r. 269.

(*l*) See *Cooke's Bank. Law*, 13 and 14, 8th ed. *Quære*, how this could be done consistently with the doctrine that a person once made bankrupt cannot, until he has obtained his certificate, be made bankrupt again? See, on this subject, 1

Mont. Part. notes K. and 2 B. pp. 44 and 100 of the appendix.

(*m*) The bankruptcy of a firm is in fact the bankruptcy of the individuals composing it. See *Graham v. Mulcaster*, 4 Bing. 115; *Stonehouse v. De Silva*, 3 Camp. 399.

(*n*) In *Ex parte* Gardner, 1 V. & B. 77, a creditor of a firm obtained separate adjudications against all the partners, but Lord Eldon evidently disapproved of that course. But see *Ex parte* Duncan, 1 Mon.

**Several adjudications against same person.**—It used to be considered that a person who had been once made bankrupt was incapable of being made bankrupt again unless he had obtained a certificate; and that a second adjudication against him was utterly void. (*o*) But the correctness of this view has been since denied; and it has been decided that the trustees under a second adjudication against an uncertificated bankrupt are entitled to recover property acquired by him since the first adjudication. (*p*) It is, however, obvious that inasmuch as all the property of a bankrupt, until he has obtained his order of discharge, may be acquired by his trustee for the benefit of his creditors, a second adjudication against him is generally of little, if any, use if the trustee in the first bankruptcy interferes. (*q*)

**Joint adjudication after a separate one — Annulling adjudication.**— But this observation does not apply to the case of a partner; for, in general, it is much more expeditious, cheap, and otherwise advantageous, to wind up the affairs of partners under a joint adjudication against the firm than under one or more separate adjudications against the members thereof individually. Consequently joint are regarded \*with more favor than separate adjudi- [\*640] cations; and if a separate adjudication has been obtained against a partner, and a joint adjudication is after-

D. & D. 149, and *Ex parte Burdikin*, 2 id. 187.

(*o*) *Ex parte Crew*, 16 Ves. 237; *Nelson v. Cherrell*, 7 Bing. 663; *Phillips v. Hopwood*, 1 B. & Ad. 619; *Martin v. O'Hara*, Cowp. 823; *Ex parte Proudfoot*, 1 Atk. 251; *Ex parte Brown*, and *Ex parte Muntion*, 1 V. & B. 60; *Till v. Wilson*, 7 B. & C. 690; *Fowler v. Coster*, 10 id. 427. And see *Ex parte Chambers*, 3 M. & A. 294, and a note to *Ex parte Welsh*, Mont. 280, where all the cases on the subject will be found collected. See, too, 1 Mont.

Part. note K. p. 44, and 2 B. p. 100. If there are two commissions, and the first has never been acted on, the second is valid. See *Warner v. Barber*, 8 Taunt. 176.

(*p*) *Ex parte Watson*, 12 Ch. D. 380; *Morgan v. Knight*, 15 C. B. N. S. 669. See, also, *Ex parte Dewhurst*, 7 Ch. 135.

(*q*) As to the relative rights of the first and second sets of trustees, see *Ex parte Ford*, 1 Ch. D. 521; *Ex parte Caughey*, 4 Ch. D. 533; *Ex parte Watson*, 12 id. 380.

wards obtained against the firm to which he belongs, the courts will give effect to the latter adjudication and annul the former, unless injustice will result from so doing. This course was first adopted by Lord Thurlow in *Ex parte Hardcastle*, (r) and the advantages of a more extensive adjudication over a less extensive one were so great that it became quite a matter of course to annul separate adjudications against individual partners where a valid joint adjudication against the firm had been also obtained. (s) But if the joint adjudication was invalid, *e. g.*, owing to the insufficiency of the petitioning creditor's debt, or of the evidence showing acts of bankruptcy by all the persons included in it, or if there was no joint estate worth mentioning, a prior separate adjudication would not be annulled. (t) Moreover, although as a rule, a separate adjudication would be annulled in order that a subsequent joint adjudication might be proceeded with, this was only because, as a rule, it was most to the advantage of creditors that this course should be taken. The courts would, in their discretion, support whichever of several adjudications allowed most complete justice to be done, and annul all the others; (u) and instances are not wanting in which joint adjudications have been annulled and separate adjudications allowed to proceed. (x) In *Re O'Reardon* one of two partners was adjudicated bankrupt in England, and the other was adjudi-

(r) 1 Cox, 397.

(s) *Ex parte* Pemberton, 1 M. D. & D. 190. The cases in which joint commissions have been upheld and separate ones superseded are very numerous. The following are those most usually referred to: *Ex parte* Brown, 1 V. & B. 60; *Ex parte* Rawson, 1 V. & C. 160; S. C. *Ex parte* Masson, 1 Rose, 159; *Ex parte* Smith, 1 Gl. & J. 256; *Ex parte* Patchelor, 2 Rose, 26; *Ex parte* Burdikin, 2 M. D. & D. 187; *Ex parte* Digby, 1 Deac. 347. As to con-

solidating the proceedings under petitions for joint and separate adjudications respectively, see *Ex parte* Mackenzie, 20 Eq. 758.

(t) *Ex parte* Roberts, 1 Madd. 72; *Re* Beale, 2 Dru. & War. 566; *Ex parte* Rennick, 12 Jur. 996.

(u) *Ex parte* Crew, 16 Ves. 237; *Ex parte* Rawson, 1 V. & B. 163; *Ex parte* Cridland, 2 Rose, 164.

(x) *Ex parte* Rowlandson, 1 Rose, 89. And see *Ex parte* Cutten, Buck, 68; *Ex parte* Hamper, 17 Ves. 403. See, too, the last note but one.

cated bankrupt in Ireland; both were then jointly adjudicated bankrupt in Ireland; most of the joint [\*641] creditors and a considerable part of the joint estate were in England. The court in England declined to order the joint assets to be remitted to Ireland for distribution there. (*y*)

**Bankrupt firms with common partners.**— Again, where two firms having a common partner were both adjudged bankrupt, in which case the common partner was adjudged bankrupt twice over, the latest of the adjudications was superseded as to him. (*z*) It was at one time doubted whether this could be done; (*a*) but that doubt was long ago removed, and there is a case in which an unwilling purchaser was compelled to take an estate, the title to which depended on this very point. (*aa*)

**Supporting one adjudication by proceedings in another.**— Where a separate adjudication had been made and a joint adjudication was afterwards petitioned for, but there was no sufficient evidence to support it without having recourse to what had been proved in the matter of the separate adjudication, use was made of what had been so proved, and the evidence given in support of the separate adjudication was ordered to be produced in order that a joint adjudication might be made. (*b*) When a separate adjudication against one partner was annulled in favor of a joint adjudication against him and his copartners, it was usually expressly declared in the annulling order (*c*) that all sales under the first bankruptcy should be confirmed and carried into execution by the assignees under the second; that the proofs of debts under the first should be considered as if

(*y*) *Re O'Reardon*, 9 Ch. 74.

(*z*) *Ex parte Coleman*, Mon. & McAr. 15; *Ex parte Bygrave*, 2 Gl. & Jam. 391.

(*a*) *Ex parte Burlton*, 2 Gl. & Jam. 344.

(*aa*) *Burlton v. Wall*, Tam. 113.

(*b*) *Ex parte Sharp*, 2 Mon. D. &

D. 350; *Ex parte Harrison*, 2 Gl. & J. 135. *Ex parte Burdekin*, 1 Deac. 57, is, however, opposed to these.

(*c*) See the precedents in *Ex parte Mason or Rawson*, 1 Rose, 428; *Re Colbeck*, Buck, 54; *Ex parte Digby*, 1 Deac. 347; *Ex parte Ravenscroft*,

4 id. 172.

they had been made under the second; (*d*) that all creditors should be admitted to prove under the second bankruptcy; that distinct accounts of the joint and separate estates should be kept; that the assignees in the first bankruptcy should account to those in the second for assets possessed under the first, and should allow actions to \*be brought in their names by the assignees under the second bankruptcy.

**Costs of annulling.**—The costs of annulling a separate, in order to give effect to a joint, adjudication, were usually borne by the joint estate. (*e*)

**Annulling after certificate.**—The fact that the bankrupt had obtained his order of discharge under an adjudication did not prevent such adjudication from being annulled. (*f*)

**Staying proceedings instead of annulling.**—Where, in consequence of what had been done under an adjudication, it was inexpedient to annul it, the practice was not to annul but to impound it, and to stay all further proceedings under it. (*g*)

**Legality of annulling one adjudication to give effect to another.**—The power to annul a prior adjudication and to give effect to a subsequent one was not so clearly established at law as it was in bankruptcy and in equity. (*h*) Hence an injunction to restrain the production at law of

(*d*) See *Ex parte Bateson*, 1 M. D. & D. 500.

(*e*) *Ex parte Duncan*, 1 M. D. & D. 149; *Ex parte Burdekin*, id. 156; *Ex parte Sharp*, 2 id. 531; *Ex parte Peat*, id. 788. See, too, *Ex parte Morris*, 10 Jur. 1018, where an invalid adjudication against three persons was annulled to give effect to a subsequent adjudication against two of them.

(*f*) *Ex parte Cutten*, Buck, 68; *Ex parte Rowlandson*, 1 Rose, 89;

*Ex parte Gillam*, 2 Cox, 193; *Ex parte Poole*, id. 227.

(*g*) See *Ex parte Tobin*, 1 V. & B. 308; *Ex parte Rowlandson*, 1 Rose, 416; *Re Colbeck*, Buck, 54; *Ex parte Digby*, 1 Deac. 347; *Ex parte Ravenscroft*, 4 Deac. 172; *Ex parte Lister*, 3 id. 516.

(*h*) *Butt v. Bilke*, 4 Price, 241, and 2 Rose, 171, note. And see Lord Eldon's observations in *Ex parte Lees*, 16 Ves. 472, and in *Ex parte Cridland*, 2 Rose, 167. And see 1 Mont. Part. 51 and 52, notes.

evidence to show the existence of the annulled bankruptcy would, if necessary, be granted. (*i*) However, in one case, where an action was brought by assignees and a verdict was obtained by them, but a petition for superseding their commission was pending, the court of king's bench, on the application of the defendant, stayed execution, and ordered that the amount recovered should be paid into court. (*k*)

**Modern practice.**—It has been considered desirable thus to refer to the former practice, because, although the Bankruptcy Act, 1883, does not contain any express provision for annulling or superseding \*a separate in [\*643] favor of a joint adjudication, circumstances may arise which render such a proceeding desirable; and as the old practice is preserved, the previously established rules on this subject will probably not be disregarded. (*l*)

**Grounds for annulling an adjudication.**—Under the Bankruptcy Act, 1883, an adjudication may be annulled if the court is of opinion that the debtor ought not to have been adjudged bankrupt, or if his debts have been paid in full; (*m*) but no other ground for annulling an adjudication is expressly mentioned. But the general power to stay and consolidate proceedings is probably sufficient for most if not all practical purposes. (*n*)

The consequences of annulling an adjudication are stated in section 35 (2) to be as follows:

**Consequences of annulling of adjudication.**—§ 35. (2) Where an adjudication is annulled under this section all sales and dispositions of property and payments duly made, and all acts theretofore done by the official receiver, trustee, or other person acting under their authority, or by the court, shall be valid, but the property of the debtor who was adjudged bankrupt shall vest in such person as the court may appoint,

(*i*) *Ex parte* Thompson, 1 Rose, *Ex parte* Claxton, 7 Ch. 532, and 285. The fact that an adjudication

has been annulled can now, it is apprehended, be set up as a defense without difficulty.

(*k*) *Hodgkinson v. Travers*, 1 B. & C. 257.

(*l*) See Bank. Rules, 1886, r. 353;

*infra*, p. 666.

(*m*) 46 and 47 Vict. ch. 52, § 35.

(*n*) See §§ 106, 109; and as to annulling an adjudication obtained *mala fide* to dissolve a partnership, see *ante*, p. 636.

or in default of any such appointment revert to the debtor for all his estate or interest therein on such terms and subject to such conditions, if any, as the court may declare by order. (d)

By the Bankruptcy Act, 1883, section 106, it is enacted that

**Consolidation of proceedings.**—Where two or more bankruptcy petitions are presented against the same debtor or against joint debtors, the court may consolidate the proceedings, or any of them, on such terms as the court thinks fit.

It is therefore to be inferred that, under the present as under the old law, if separate adjudications are ob-  
[\*644] tained \*against all the members of a firm, the separate adjudications may be consolidated and prosecuted as if there were a joint adjudication; (p) and if there is also a joint adjudication, an order may be obtained consolidating them all, and staying further proceedings under the separate adjudications. (q) So, if two firms are separately adjudged bankrupt, the two adjudications will be consolidated and prosecuted as one, if so to do will be for the benefit of the creditors of both firms. (r)

By the Bankruptcy Act, 1883, it is also enacted by section 112 that

**Property of partners to be vested in same trustee.**—§ 112. Where a receiving order has been made on a bankruptcy petition against or by one member of a partnership, any other bankruptcy petition against or by a member of the same partnership shall be filed in or transferred to

(o) See, on the corresponding section of the act of 1869, *West v. Baker*, 1 Ex. D. 44; *Bailey v. Johnson*, L. R. 7 Ex. 263, and 6 id. 269. 77; and *Buck*, 260, in the note. Compare *Ex parte Milner*, 19 Ves. 204; *Gould v. Shoyer*, 6 Bing. 738.

Under the old law the effect of annulling an adjudication depended upon the cause for which it was annulled. If annulled upon the ground that it ought never to have been made, then, speaking generally, everything done under it was invalid; but if annulled upon some other ground, then the annulment had no retrospective effect. See *Smallcomb v. Olivier*, 13 M. & W. 758.

(p) *Re Gowar*, 1 M. D. & D. 1.  
(q) *Ex parte Lister*, Mon. & Ch. 260; *Ex parte Mackenzie*, 20 Eq. 758.  
(r) See in *Harris v. Farwell*, 13 Beav. 403; *Ex parte Grylls*, 12 Jur. 171, a firm trading in one district was adjudicated bankrupt in another where one of the partners resided. The proceedings were removed from the latter to the former district.



the court in which the first-mentioned petition is in course of prosecution, and, unless the court otherwise directs, the same trustee or receiver shall be appointed as may have been appointed in respect of the property of the first-mentioned member of the partnership, and the court may give such directions for consolidating the proceedings under the petitions as it thinks just.

Under this section it would probably be held, as it was under the older law, that if there is a separate adjudication against one partner, and a joint adjudication against his co-partners, either with him or without him, the joint adjudication will be ordered to be prosecuted with the separate adjudication. (*s*)

#### 4. *Choice of trustee.*

Separate creditors cannot vote in the choice of a trustee under a joint adjudication; (*t*) but joint creditors are entitled \*to vote in the choice of a trustee under a [\*645] separate adjudication. (*u*)

**Effect of annulling adjudication.**—If a separate is annulled in favor of a joint adjudication, the separate creditors lose their right to vote in the choice of a trustee; but this has been decided not to be a sufficient reason for preserving the first adjudication. (*x*)

Upon a joint adjudication against a firm the trustee appointed by the joint creditors is the trustee of the separate

(*s*) See *Ex parte Mackenzie*, 20 Eq. 758; *Ex parte Green*, 3 De G. & J. 50; *Ex parte Haines*, id. 58; *Re Simmons*, 2 M. D. & D. 603. See, also, the last note.

(*t*) *Ex parte Parr*, 18 Ves. 65; *Ex parte Jepson*, 19 Ves. 224; *Ex parte Hamer*, 1 Rose, 321. These cases were all decided long before the passing of the present bankrupt act, but they are generally understood to be in accordance with the present state of the law.

(*u*) 46 and 47 Vict. ch. 52, Sched. 1, § 13. A firm may vote by any

of its members. 46 and 47 Vict. ch. 52, § 148. A corporation votes by an officer appointed under its common seal. Id. Companies empowered to sue by public officers vote by them or by attorneys appointed by them (see Bank. Rules, 1886, r. 245, and forms, and r. 258; *Ex parte Ackroyd*, 1 M. D. & D. 555); and the appointment of the attorney need not be under seal. *Naylor v. Mortimore*, 17 C. B. N. S. 207.

(*x*) See *Ex parte Pachelor*, 2 Rose, 26.

estates. But each set of separate creditors may appoint its own committee of inspection; in default of such appointment the committee (if any) appointed by the joint creditors is deemed to be appointed by the separate creditors also. See Bank. Rules, 1886, r. 268.

**Appointment of inspectors to protect the separate creditors.**—Under the old practice, where there was a joint adjudication, and assignees had been chosen by the joint creditors, (*y*) and the separate creditors of one of the bankrupts could show that their interests required it, they were allowed to appoint an inspector of the separate estate of the bankrupt in question; and the inspector appointed was empowered to collect, and get in, such separate estate, and to use the names of the assignees for that purpose, indemnifying them against the costs of proceedings taken in their names; he was also directed to pay what he received into such bank as the separate creditors might select; and was authorized to inspect, and take copies of, all books and documents in the possession of the assignees, and relating to the separate estate. (*z*) The costs of obtaining an [\*646] \*order for liberty to choose an inspector, and also the costs, charges and expenses properly incurred by him in the execution of his duties, were borne by the estate to protect which he was appointed. (*a*) A similar course was pursued where there was no joint adjudication, but where the joint creditors had appointed the assignees, and the interests of the separate creditors required protection. (*b*)

(*y*) *Re Daintry*, 2 M. D. & D. 257, & D. 434; *Ex parte Wilson*, 1 id. 310; *Ex parte Dawson*, 3 D. & C. 12; *Ex parte Batson*, 1 Gl. & J. 269; *Ex parte Miles*, 2 Rose, 68; and *Ex parte Halford*, id. 485, *Ex parte Basarro*, 1 id. 266. shows that leave to appoint an inspector would not be granted before the assignees were chosen; and shows that liberty to appoint an inspector would not be refused simply because there was no imputation against the assignees.

(*a*) *Ex parte Holford*, 2 M. D. & D. 485, and see the cases in the last note. (*b*) *Ex parte Melbourne*, 6 Ch.

(*z*) See *Ex parte Wright*, 2 M. D. 835.

The present rule 268 will, however, probably render it unnecessary to have recourse to this practice except under very special circumstances.

SECTION II.—THE PROPERTY WHICH VESTS IN THE TRUSTEE,  
AND THE CONSEQUENCES OF SUCH VESTING

1. *Generally.*

**Property vesting in trustee.**—Speaking generally, it may be said that, when a person is adjudicated bankrupt, all property, both real and personal, to which he is then beneficially entitled, or to which he becomes beneficially entitled before he obtains his order of discharge, vests in his trustee for the benefit of his creditors. (*c*)

**Property vesting in the trustee of a bankrupt firm.**—When a firm of partners is adjudicated bankrupt, or when a joint adjudication is made against two or more partners, all the joint property of the bankrupts, as well as all the separate property of each of them, vests in the trustee. (*d*) Moreover, their joint property vests in the trustee as joint property, and without reference to the equality or inequality of the bankrupts' shares therein. (*e*)

Before the Judicature Acts, when each of the members of a firm was separately adjudged bankrupt, the trustees of them all could not recover in one action debts due to the firm, and \*also debts due to the partners separately. The trustee of each partner must have sued alone for the recovery of debts due to him only. (*f*) But probably it would be held otherwise now if expedient. (*g*)

(*c*) 46 and 47 Vict. ch. 52, §§ 20 (1), 44, 54.

(*d*) Bank. Rules, 1886, r. 268; *Ex parte Cook*, 2 P. W. 500; *Hague v. Rolleston*, 4 Burr 2176; *Bolton v. Puller*, 1 Bos. & P. 539; *Graham v. Mulcaster*, 4 Bing. 115. So under the Indian Insolvency Act, 11 and 12 Vict. ch. 21. *Brown v. Carbery*, 16 C. B. N. S. 2.

(*e*) *Ex parte Hunter*, 2 Rose, 382.

(*f*) See *Hancock v. Haywood*, 3 T. R. 433; and as to the declaration in an action by several sets of assignees for the recovery of a joint debt, see *Ray v. Davies*, 8 Taunt. 134.

(*g*) See Jud. Rules, 1883, Ord. xvi, rr. 1, 4, 6; and Ord. xviii, rr. 1, 3, 6.

**Property vesting in trustee of bankrupt partner.**—When one of several partners is adjudicated bankrupt his trustee becomes entitled to all his separate property, and to all his interest in the joint property; (*h*) but, subject to the qualification alluded to below (p. 653), the trustee can claim no more than the bankrupt himself would have been entitled to had he not become bankrupt; and every lien available for his copartners against him is equally available for them against his trustee. (*i*) Consequently the trustee can claim nothing as the bankrupt's share until all the joint creditors have been paid (*k*) and the partnership accounts have been duly taken and adjusted. (*l*) On the other hand the solvent partners have no right to insist on taking the partnership assets to themselves and to pay the trustee the estimated value of the bankrupt's share; for the right of the trustee against them, as well as their right against the trustee, is to have an account, and a sale and distribution. (*m*) In one case it was even decided that a stipulation in the articles of partnership to the effect that, on the bankruptcy of one of the partners, his share should be taken by the others at a valuation was not binding on the assignees; (*n*) but the circumstances of the case were somewhat peculiar; and there seems no reason why such a stipulation should necessarily be ineffectual.

[\*648] \*In *Whitmore v. Mason*, (*o*) partnership articles contained a provision that, on the bankruptcy of a partner, an account should be taken and a valuation made of

(*h*) The trustee can, with the leave of the court, sue for a joint debt in the names of the trustee and of the bankrupt's partner. 46 and 47 Vict. ch. 52, § 113.

(*i*) See *Anon.* 3 Salk. 61, and 12 Mod. 446; *Fox v. Hanbury*, Cowp. 445; *West v. Skip*, 1 Ves. Sr. 239; *Bolton v. Puller*, 1 Bos. & P. 548; 1 Mont. Part. note P. p. 66.

(*k*) *Taylor v. Fields*, 4 Ves. 396; *Holderness v. Shackels*, 8 B. & C.

612; *Richardson v. Gooding*, 2 Vern. 293; *Ex parte Terrell*, Buck, 345; *Gross v. Dufresnay*, 2 Eq. Ab. 110, pl. 5.

(*l*) See *West v. Skip*, 1 Ves. Sr. 239, 456.

(*m*) *Crawshay v. Collins*, 15 Ves. 229; *Wilson v. Greenwood*, 1 Swanst. 471.

(*n*) *Wilson v. Greenwood*, 1 Swanst. 471.

(*o*) 2 J. & H. 204.

his share and interest in the partnership property, with the exception of a particular lease. It was held that this exception was void as against the assignees of a partner who had become bankrupt, and that they were entitled to his share in the lease. The provision as to valuing the bankrupt's share was not sought to be avoided by the assignees.

**Profits accruing subsequently to bankruptcy.**—Upon principles which have already been discussed the trustee of a bankrupt partner is entitled to an account, not only of the assets as they stood at the time of the dissolution of the firm, but also of the profits subsequently made by the employment of the bankrupt's capital in the partnership business. (*p*)

**Right of trustee to account from the executors of a deceased partner.**—Where there is a firm of two partners and one partner dies, and the other becomes bankrupt, the trustee of the latter is entitled to maintain an action on behalf of himself and all the other creditors of the deceased against his executors for the administration of his estate, and for payment of what may be due therefrom to his surviving partner. (*q*)

**Trustee does not become partner.**—The trustee, it will be observed, does not become a copartner with the solvent partners. Like purchasers from the sheriff under an execution against one partner, the trustee and the solvent partners become tenants in common of the real and personal

(*p*) See *ante*, p. 526; *Crawshay v. Collins*, 15 Ves. 218, 1 J. & W. 267, and 2 Russ. 325; *Smith v. De Silva*, Cowp. 469. This last case seems at first sight to be opposed to the existence of that lien which is above stated to be available against the trustee. But the question before the court was simply whether the assignees had a right to share profits accruing since the bankruptcy, and Lord Mansfield very

properly held that they had. His judgment certainly shows that he considered the assignees were entitled to those profits without paying what was due from the bankrupt to his copartners; but on this point the case cannot, it is conceived, be supported. See 8 B. & C. 618.

(*q*) See *Addis v. Knight*, 2 Mer. 119.

property belonging to the firm. (*r*) Moreover, as the sheriff, in the case of an execution against one partner, is entitled to seize the whole of the partnership property, [\*649] so the \*messenger of the court in bankruptcy, in the case of an adjudication against one partner, is in strictness entitled to put a person in possession of the whole of the property of the firm. This, however, is seldom done, as the solvent partners, either by consent or through the intervention of the court, make arrangements for securing to the trustee payment of the bankrupt's share in the assets of the firm. (*s*) .

**Bankruptcy a cause of dissolution.**—When one partner only is adjudged bankrupt the *firm* is thereby nevertheless dissolved. (*t*) If it were not, the solvent partners would have forced upon them as copartners persons with whom they had never agreed to be in partnership, a result which would be contrary to the fundamental principle that partnership cannot subsist between any persons save by the mutual consent of them all. The bankruptcy of one partner, moreover, dissolves the firm, not only as to him, but as to all the other copartners, *inter se*; (*u*) for, in the first place, a partnership, being a mere assemblage of persons bound together by contract, loses its identity as much by the bankruptcy as by the death of one of those persons; and, in the next place, such is the law of this country that the share of a bankrupt partner cannot be ascertained save by taking the accounts of the whole firm and distributing its clear assets amongst the solvent partners and the trustee of the bankrupt partner.

### **Jurisdiction of court of bankruptcy to ascertain share.**

As on the bankruptcy of one only of several partners the

(*r*) See *Fox v. Hanbury*, Cowp. *Ex parte Smith*, 5 Ves. 297, 1445. Mont. Part. note E. p. 22.

(*s*) A sale of the share to them need not be by auction. *Re Motion*, 9 Ch. 192. (*u*) See *Hague v. Rolleston*, 4 Burr. 2174; *Fox v. Hanbury*, Cowp. 448; *Crawshay v. Collins*, 15 Ves. 238.

(*t*) *Fox v. Hanbury*, Cowp. 448;

joint assets do not vest in his trustee, an action in the chancery division to ascertain the share of the bankrupt was formerly necessary; (*x*) but now the court in bankruptcy can itself ascertain such share. (*y*)

**Rule as to companies.**—The doctrine that on the bankruptcy of one member of a firm the whole firm is dissolved is not, it seems, applicable to \*mining [\*650] partnerships; (*z*) and although the bankruptcy of a shareholder in an unincorporated company with transferable shares may dissolve the company as to him, (*a*) it is conceived that such bankruptcy does not dissolve it as to the other shareholders *inter se*.

## 2. *Property divisible amongst the creditors.*

It is not proposed in the present treatise to enter minutely into the details of the law respecting the property which, in the event of bankruptcy, vests in the trustee, or may be made available by him for the benefit of the creditors; it will be sufficient to call attention to the short effect of the Bankruptcy Act, 1883, on this subject, and then to allude to the complicated questions which arise from the doctrines of set-off and mutual credit, the relation back of the title of the trustee, and of reputed ownership.

**Property vesting in trustee.**—On adjudication the property of a bankrupt vests in the trustee, (*b*) *i. e.*, the official receiver, until a trustee is appointed, and in the trustee when appointed. (*c*) The title of the trustee relates back to the act of bankruptcy on which the receiving order is made, or to the earliest act of bankruptcy committed within

(*x*) See *Re Motion*, 9 Ch. 192; (*z*) *Ex parte Broadbent*, 1 Mont. Morley *v. White*, 8 Ch. 214; *Ex* & A. 638; *Bentley v. Bates*, 4 Y. & *parte Gordon*, *id.* 555; *Ex parte* C. Ex. 190. *Sed quære* if the mine Rumboll, 6 Ch. 842; *Ex parte* is a partnership asset. Anderson, 5 Ch. 473; *Ex parte* Sheriff (*a*) *Greenshield's Case*, 5 De G. & S. 599.

(*y*) See 46 and 47 Vict. ch. 52, (*b*) 46 and 47 Vict. ch. 52, §§ 54 §§ 93 and 102. But as to county and 20 (1). courts see § 102. (*c*) § 54 (1, 2, 3).

three months before the presentation of the petition. (*d*) Until adjudication the property of a bankrupt continues vested in him, subject to be divested retrospectively upon adjudication. But the moment a receiving order is made the official receiver's powers and duties as a receiver commence, (*e*) so that the debtor cannot properly deal with his property, although it is not yet divested from him.

The property which on adjudication vests in the trustee is enumerated in sections 44 and 168 of the act. It includes:

1. All the bankrupt's property, both real and personal, except his tools, clothes and bedding to the value of 20*l*.
- [\*651] \*2. The right to exercise all powers which he could (but for his bankruptcy) exercise for his own benefit except the right to nominate to a vacant living.

3. All goods in his possession, order or disposition in his trade or business as reputed owner and by the consent and permission of the true owner. Trade debts are goods within the meaning of this rule, but no other choses in action are so.

Onerous property vests in the trustee; (*ee*) but may be disclaimed by him in writing within three months after the first appointment of a trustee. (*f*)

**Lands.**—Ordinary freehold estates, to which the bankrupt is entitled for life or in fee, vest in his trustee, subject to such mortgages or charges as may affect them. (*g*) Lands of which a bankrupt is seized in tail do not, strictly speaking, vest in his trustee; but such lands may be disposed of for the benefit of his creditors; (*h*) and a similar observation applies to the bankrupt's copyhold property. (*i*)

(*d*) § 43.

(*e*) § 9.

(*ee*) § 44.

(*f*) § 55.

(*g*) Where land is devised to a trader charged with a sum of money, which is allowed to remain on the security of the land, his trustee can only claim the land

subject to the charge. See *Ex parte Forster*, 1 M. D. & D. 418, and 2 id. 177, under the name Hudson v. Forster. See, too, *Ex parte Barff*, De Gex, 613.

(*h*) 46 and 47 Vict. ch. 52, § 56, cl. 5.

(*i*) § 50, cl. 4.



**Chattels.**—The personal property of a bankrupt, including all trade debts owing to him, also vests in his trustee, (*k*) subject to such charges and incumbrances (*l*) as exist thereon. But this is qualified by the doctrine that, if the bankrupt is in trade or business, his goods and chattels, if allowed by the person to whom they are pledged to remain in the bankrupt's possession, will, by virtue of the doctrines of reputed ownership, be distributable as part of the bankrupt's estate, as if they were his absolutely. (*m*)

\*The trustee is also entitled to the benefit of con- [\*652] tracts made with the bankrupt for valuable consideration. (*n*)

Where chattels purchased by the bankrupt have actually come to his possession they pass to his trustee, although he may not have paid for them; but if they have not come to his possession the seller can retain them or stop the delivery of them until their price is paid. (*o*)

**Books of account.**—No person is entitled as against the trustee to withhold possession of the books of account of the bankrupt or to claim any lien thereon. (*p*)

**Debts, good-will, etc.**—The trustee may sell the goodwill of the business of the bankrupt and the book debts due or growing due to him, and may transfer the same to any person or company. (*q*)

(*k*) §§ 44, 54 and 168. Debts owing to the bankrupt by a person to whom he is indebted are subject to set-off, as will be seen hereafter. As to how far the trustee is bound by contracts entitling others to use the bankrupt's goods, see *Ex parte Barter*, 26 Ch. A. 510.

(*l*) The Bills of Sale Act must be borne in mind, but it has no special bearing on partners. A bill of sale given by two partners, one of whom only became bankrupt, was held void as to his interest only, in *Ex parte Brown*, 9 Ch. D. 389.

(*m*) See *Jones v. Gibbons*, 9 Ves. 407. And see *infra*.

(*n*) See *Beckham v. Drake*, 2 H. L. C. 579; *Valpy v. Oakeley*, 16 Q. B. 941; *Whitmore v. Gilmour*, 12 M. & W. 808.

(*o*) See, as to stoppage *in transitu*, *Lickbarrow v. Mason*, 1 Sm. L. C.

(*p*) Bank. Rules, 1886, r. 349. The trustee of one bankrupt partner cannot take the books from the solvent copartners. *Ex parte Finch*, 1 D. & Ch. 274.

(*q*) 46 and 47 Vict. ch. 52, § 56 (1);

**Shares.**—Shares belonging to the bankrupt vest in his trustee; (*r*) but he may sell them, (*s*) or disclaim them, (*t*) without becoming a shareholder himself. But he has a right to have them registered in his own name, (*u*) unless the company's regulations contain some clause inconsistent with such right. (*w*)

**Trust property.**—Property held by the bankrupt in trust for any other person does not vest in the bankrupt's trustee. (*y*) Consequently, if a debtor assigns a debt before he becomes bankrupt, an action for the recovery of that debt must be brought in his name, or in the name of the person to whom it has been assigned, as the case may be. (*z*) The trustee has no interest in such a debt, [\*653] \*and cannot sue for it. (*a*) It has been already observed that a debtor who, in contemplation of bankruptcy, restores to or sets apart for his *cestui que trust* that which is vested in himself merely as a trustee, does not commit an act of fraudulent preference; (*b*) and if a bankrupt has had property intrusted to him for a particular purpose his trustee must apply it to that purpose; (*c*) and if,

Kitson v. Hardwick, L. R. 7 C. P. 473. As to a sale of the share of a bankrupt partner, see *Re Motion*, 9 Ch. 192. As to sale of good-will, *Walker v. Mottram*, 19 Ch. D. 355.

(*r*) Id. §§ 44, 54 and 168.

(*s*) Id. § 50, cl. 3.

(*t*) Id. § 55.

(*u*) *Re Bentham Mills Spinning Co.* 11 Ch. D. 900, where the bankrupt was indebted to the company.

(*x*) *Ex parte Harrison*, 28 Ch. D. 363.

(*y*) 46 and 47 Vict. ch. 52, § 44, cl. 1; *Joy v. Campbell*, 1 Sch. & Lef. 328; *Pinkett v. Wright*, 2 Ha. 120. See, as to reputed ownership, *infra*, and as to the effect of an equitable assignment, *Burn v. Carvalho*, 4 M. & Cr. 690.

(*z*) *Winch v. Keeley*, 1 T. R. 619; *Boddington v. Castelli*, 1 E. & B. 879, affirming *Castelli v. Boddington*, id. 66. Whether the assignee of the debt can sue depends on the application of the Jud. Act, 1873, § 25, cl. 6.

(*a*) *Carpenter v. Marnell*, 3 Bos. & P. 40.

(*b*) *Ante*, p. 630.

(*c*) See the authorities referred to *infra*, § 4, in connection with the subject of secured bills, and *Ex parte Waring*. See, also, *Ex parte Carrick*, 2 De G. & J. 208; *Ex parte Gledstanes*, 3 M. D. & D. 109; *Ex parte Mackey*, 2 id. 136; *Ex parte Glyn*, 1 id. 25; *Ex parte Brown*, 3 M. & A. 471. And see as to a creditor's right of appropriating securi-

being unable to accomplish it, the bankrupt has returned the property, his trustee cannot recover it. (*d*)

**Trustee stands in the place of the bankrupt.**— It is not unusually said that the trustee represents the bankrupt, and has no more extensive rights against third persons than the bankrupt himself would have had if he had continued solvent; but this proposition is much too general. It cannot be relied upon as regards property affected by the doctrines of reputed ownership, nor as regards acts done by the bankrupt since the commission by him of an act of bankruptcy, nor as regards acts which, though binding on him, are fraudulent or void as against his creditors. (*e*) Except, however, as regards such matters, the rule holds good; and its consequences are important, especially with respect to bankrupt trustees and bankrupt partners.

**Transactions void as against trustee.**— The Bankruptcy Act, 1883, avoids as against the trustee:

1. All fraudulent preferences; (*f*) but there is an exception in favor of purchasers for value without notice. (*g*)

\*2. All voluntary settlements or dispositions of [\*654] property made within two years before the bankruptcy, or even if made within ten years before, unless the parties claiming the property can prove that the settlor, etc., had other assets sufficient to enable him to pay his debts, (*h*) and that his interest in the property in question passed to the trustee or grantee thereof. (*i*)

ties to one debt rather than to another, *Ex parte* Johnson, 3 De G. M. & G. 218, and the cases above cited.

(*d*) *Edwards v. Glyn*, 2 E. & E. 29; *Toovey v. Milne*, 2 B. & A. 683; *Moore v. Barthrop*, 1 B. & C. 5. See *ante*, p. 630.

(*e*) See, as to this, *Anderson v. Maltby*, 2 Ves. Jr. 255; *Billiter v. Young*, 6 E. & B. 40. See, also, *Ex parte* Barter, 26 Ch. D. 510, as

to the trustee not being bound by a contract enabling a third person to use the bankrupt's goods to complete a contract entered into by him.

(*f*) § 48, *ante*, p. 628.

(*g*) *Ibid*.

(*h*) See *Ex parte* Mercer, 17 Q. B. D. 290; *Ex parte* Russell, 19 Ch. D. 588; *Re Ridler*, 22 id. 74.

(*i*) § 47 (1) and (3), much abridged; *Ex parte* Todd, 10 Q. B. D. 186. And see § 29. See p. 628, note (*l*).

3. Covenants to settle after-acquired property in which the debtor had no vested or contingent interest and which does not come to him through his wife. (*k*)

**Executions.**—The statute further enables the trustee in certain cases to obtain the benefit of executions against debtors who are adjudicated bankrupt. (*l*)

**Protected transactions.**—On the other hand, the statute contains an important provision (*m*) for the protection of persons *bona fide* dealing with a person liable to be adjudicated bankrupt, and having no notice of any act of bankruptcy committed by him. This provision, however, does not protect any transaction avoided by sections 45, 47 or 48.

### 3. *Of set-off and mutual credit.*

**Mutual credits.**—With respect to debts owing to a bankrupt by persons to whom he is indebted, the balance only is regarded as payable to or by his estate. This equitable doctrine rests upon a statutory enactment, (*n*) which allows debts to be set off against each other in many cases in which they could not be set off had no bankruptcy intervened. (*o*) The enactment which now regulates this subject is as follows: (*p*)

[\*655] **\*Mutual credit and set-off.**—§ 38. Where there have been mutual credits, mutual debts, or other mutual dealings between a debtor against whom a receiving order shall be made under this act, and any other person proving or claiming to prove a debt under such receiving order, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due

(*k*) § 47 (2). And see § 29. See (*p*) 46 and 47 Vict. ch. 52, § 38. p. 628, note (*l*). The section does not apply to debts

(*l*) § 46, set out *infra*, p. 675.

(*m*) § 49, set out *infra*, p. 664.

(*n*) It was, however, recognized before the mutual credit clause found its way into the Bankruptcy Acts. See Anon. 1 Mod. 215; Chapman v. Derby, 2 Vern. 117.

(*o*) See *Ex parte* Stephens, 11 Ves. 24.

due to or from a firm if one member only is bankrupt (Lon., Bombay and Med. Bank v. Narraway, 15 Eq. 93); nor to actions brought by bankrupts as trustees for other persons. De Mattos v. Saunders, L. R. 7 C. P. 570.

from the one party shall be set off against any sum due from the other party, and the balance of the account, and no more, shall be claimed or paid on either side respectively; but a person shall not be entitled under this section to claim the benefit of any set-off against the property of a debtor in any case where he had, at the time of giving credit to the debtor, notice of an act of bankruptcy committed by the debtor, and available against him.

**Tendency to allow rather than disallow set-off.**—The above clause is evidently framed with a view to prevent the great injustice which would arise if a person who was the creditor of a bankrupt on one account and his debtor on the other were compelled to pay twenty shillings in the pound on what he owed to the bankrupt, and to receive less than twenty shillings in the pound on what the bankrupt owed him. There is, therefore, a strong tendency to construe the clause in question extensively rather than restrictively, or, in other words, to favor the setting off of cross-demands by and against bankrupts; (*q*) at the same time the courts cannot carry the doctrines of set-off further than the language and spirit of the enactment warrant, and some of the earlier cases on the subject have been considered as having gone too far. (*r*)

The general doctrine is well illustrated by *French v. Fenn* and *Easum v. Cato*. In *French v. Fenn* (*s*) the defendant purchased a row of pearls, and agreed with one Cox to give him one-third of the profits to arise from a sale of them. Cox became bankrupt, and *afterwards* the defendant sold the pearls, and Cox's assignees demanded one-third of the profits of the sale, declining to allow the defendant to set off a debt due from Cox to him at the time of the bankruptcy; but it was decided that such set-off ought to be allowed. The court held that there was a great distinction between mutual debts and mutual credits, and that, although the defendant was not indebted to Cox at the

(*q*) See *Ryall v. Rowles*, 1 Ves. Sr. 375. with *Ex parte Deeze*, 1 Atk. 228, and *Ex parte Quintin*, 3 Ves. 248.

(*r*) This is particularly the case (*s*) 3 Doug. 257, and *Cooke's Bank. Law*, 565 (8th ed.).

time of his bankruptcy, inasmuch as the pearls had [\*656] \*not then been sold, there was a clear case of mutual credit justifying the set-off.

*Easum v. Cato* (t) goes even further than the last case. There the bankrupts shipped goods for sale in the name of Cato, to whom they were indebted; Cato assented to the use of his name, and he received the proceeds of the sale; he was sued for these proceeds by the assignees, and was held entitled to set off against them what was owing to him by the bankrupts, although the goods were in no sense his.

The authority of these cases has been sometimes thought to be shaken by *Young v. The Bank of Bengal*. (u) There the privy council held that bankers with whom notes of the East India Company had been deposited as a security for a loan, and who were empowered to sell the notes if the loan was not paid, were not entitled, after their debtor had become bankrupt, to set off the proceeds of the sale of the notes against a debt owing by the bankrupt to them unconnected with the loan in question, and arising from the discount by the bankers of the bankrupt's paper before such loan was made. In this case, however, not only had the notes deposited with the bankers not been sold by them before bankruptcy, but the bankers were, in truth, precluded by their own agreement from holding the deposited paper for any other purpose than as a security for the loan to which it was specially appropriated. *Young v. The Bank of Bengal*, therefore, merely shows that even if the deposited notes could be treated as cash, yet the right to set off cross-money demands under the mutual credit clause only exists where there is no agreement inconsistent with the exercise of such right. (x)

(t) 5 B. & A. 861.

Key v. Flint, 8 Taunt. 21; Thomas

(u) 1 Deac. 622. See, on this v. Da Costa, 8 Taunt. 345, and case, Alsager v. Currie, 12 M. & W. 751. Buchanan v. Findlay, 9 B. & C. 738, also illustrate this doctrine.

(x) *Ex parte* Flint, 1 Swanst. 30; See, too, Hill v. Smith, 12 M. & W.

**\*Set-off allowed independently of intention.—** [\*657]

It has, however, long been established that mutual credit within the meaning of the Bankruptcy Acts may exist independently of any intention to create a right of set-off. For example, if A. sells goods to B., and B. obtains from third parties an acceptance of A.'s without his knowledge, A.'s claim against B. for the goods sold, and B.'s claim against A. on the bill, may be set off on A.'s bankruptcy, although the acceptance has not fallen due. (y)

**Cases of bills returned dishonored.**— Moreover the mutual credit clause applies, although the demand of the bankrupt may not have been continuous from the time when it accrued to the time of the bankruptcy. This is often the case when the bankrupt's claim rests on a bill of exchange which he has indorsed away, but which after his bankruptcy is returned dishonored. Thus, in *Bolland v. Nash*, (z) A. accepted a bill for advances made to him by his bankers, and they indorsed the bill to a third person for value and became bankrupts. The indorsee was himself indebted to the bankers; and he having required A. to pay the bill, which A. refused to do, and having then set the debts due to himself from the bankers and to them from himself against each other, returned the bill to the assignees. They then sued A. upon it, but it was held that he was entitled to set off the balance due from the bankers to him on his account with them at the time of their bankruptcy, although at that time they did not hold his bill.

618. See, further, as to general liens and to their not attaching to particular securities, *Re Bowes*, 33 Ch. D. 586; *Brandao v. Barnett*, 1 Man. & Gr. 908; 6 id. 620; and 12 Cl. & Fin. 787; *Bock v. Gorrisen*, 2 De G. F. & J. 434; *Jones v. Pepercorne*, Johns. 430; *Olive v. Smith*, 5 Taunt. 56. And as to liens on funds appropriated to the payment of particular bills, see *Inman v. Clare*, Johns. 769; *Jeffries v. Agra and Masterman's Bank*, 2 Eq. 674. (y) *Hankey v. Smith*, 3 T. R. 507. See, also, *Bailey v. Johnson*, L. R. 6 Ex. 279, and 7 Ex. 263, for another but different example turning on §§ 39 and 81 of the Bank Act, 1869. (z) 8 B. & C. 105. See, too, *Ex parte Staddon*, 3 M. D. & D. 256, noticed *infra*, p. 662; and *Ex parte Huckey*, 1 Madd. 577.

**Debts not yet due.**—It is also established that demands by and against a bankrupt may be set off, although they may not have become enforceable previously to his bankruptcy; *e. g.*, where bills have been accepted but have not become due; (*a*) where calls have become due since the bankruptcy. (*b*)

It may also be observed that simple contract [\*658] debts may be \*set off against specialty debts, and *vice versa*; (*c*) that where damages are provable they may be set off against debts; (*d*) and that a secured creditor who owes money to the bankrupt has a right to set off what he owes from the amount due to him on his security and to treat the security as a security for the balance. (*e*)

**Rules as to set-off in cases of bankruptcy.**—In order, however, that cross-demands may be set off against each other under the mutual credit clause, it is necessary —

1. That both demands shall be money demands, and that the sum sought to be set off against the trustees shall be provable against the bankrupt's estate.

2. That the demands shall be mutual.

3. That the demands against the bankrupt shall have arisen before the demandant had notice of the commission of an act of bankruptcy.

**First, as to the nature of the demands.**—It was held in the well-known case of *Rose v. Hart* (*f*) that a fuller, who was sued by the assignees of a bankrupt for the recovery of cloths sent to be dressed, could not retain the goods until he was paid all moneys owing by the bankrupt for services

(*a*) *Ex parte* Wagstaff, 13 Ves. 65; *Ex parte* Boyle, Cooke's Bank. L. 571 (ed. 8); *Sheldon v. Rothchild*, 8 Taunt. 156.

(*b*) *Carralli and Haggard's Claim*, 4 Ch. 174; *Re Duckworth*, 2 Ch. 578; *Ex parte* Strang, 5 Ch. 492.

(*c*) *Lanesborough v. Jones*, 1 P. W. 325.

(*d*) *Mersey Steel and Iron Co. v. Naylor & Co.* 9 App. Ca. 438, and

9 Q. B. D. 648; *Peat v. Jones*, 8 Q. B. D. 147. See as to value of tillages and rent, *Alloway v. Steere*, 10 Q. B. D. 22.

(*e*) *Ex parte* Barnett, 9 Ch. 293.

(*f*) 8 Taunt. 499, and 2 Sm. L. C., following *Ex parte* Ockenden; 1 Atk. 235, and correcting *Ex parte* Deeze, 1 Atk. 228, and *Ex parte* Prescott, id. 230.



previously rendered him. The assignees' demand was not in substance a money demand at all; they claimed the goods; and against such a claim it was decided that the fuller could only oppose his lien for what was due in respect of his work on those goods. (*g*)

The doctrine thus established in *Rose v. Hart*, viz., that by mutual credits are meant credits which from their nature must, or at all events probably will, terminate in debts (*i. e.*, money demands), has ever since been recognized as correct; and applies to the expression mutual dealings (*h*) in the Bankruptcy Act, 1883.

**\*Secondly, as to the mutuality of the demands. [\*659]**

Cross-demands cannot be set off against each other unless they exist in favor of and against the same persons in the same rights. In *Forster v. Smith*, (*i*) Wilson & Co. were on the one hand indebted to their bankers, and were on the other hand their creditors in respect of three parcels of bank-notes. One of these parcels belonged to Wilson & Co.; another parcel also belonged to them, but only as a security for debts owing to them by third persons; the third parcel was held by Wilson & Co. merely as trustees. On the bankruptcy of the bankers it was held that Wilson & Co. were entitled to set off against their debt to the bankers the amount of the two first parcels of notes, but not the amount of the third.

Other cases may be referred to as authorities for the proposition that a debt owing by a person in his individual capacity cannot, in bankruptcy, be set off against a debt owing to him as trustee. (*k*)

(*g*) If the defendant has sold the goods, and the assignees had sued for the money produced by their sale, the result would, it is conceived, have been the same. See *Ex parte* Ross, Buck, 125. Price, 10 Ch. 648, where a liquidator of a company proved for a debt due to it, and the trustee was held not entitled to deduct the estimated value of a current policy issued by the company.

(*h*) See *Eberle's Hotels Co. v. Jonas*, 18 Q. B. D. 459; *Ex parte* Bolland, 8 Ch. D. 225; *Ex parte* (i) 12 M. & W. 191. (*k*) See *Ex parte* Morier, 12 Ch. D. 491; *Ex parte* Kingston, 6 Ch.

**Case where one partner only is bankrupt.**—It was at one time thought that in an action by the assignees of a bankrupt the defendant could not set off a debt due to him from the bankrupt; as although the assignees might sue him he could not sue them. (*l*) But this notion has long been deservedly exploded. (*m*) But before the Judicature Acts, if some only of the members of a firm were bankrupt, and the trustees of the bankrupt partners, together with the solvent partners, joined in an action for the recovery of a debt due to the firm, the defendant could not set off a debt due from the firm to him. (*n*) But now it is apprehended this could be done. (*o*)

[\*660] **\*Joint debts cannot be set off against separate debts.**—The doctrine of mutuality is of especial importance to partners, for from it it follows that a demand against a firm cannot be set off against a cross-demand of some or one only of its members, and that a demand by one or more partners cannot be met by setting off a cross-demand against a firm consisting of him or them and others. This rule is as clearly established in bankruptcy as it was at law and in equity, when the rights of solvent persons only were under consideration. (*p*)

In *Watts v. Christie*, (*q*) bankers were indebted to A. on his separate account, but were creditors of A. & Co. on their joint account. Whilst the bankers were in difficulties, but before they committed any act of bankruptcy, A. assigned what was due to him on his separate account to A. & Co., and directed the bankers to transfer what was stand-

632; *Bailey v. Finch*, L. R. 7 Q. B. 34, where the executor was himself residuary legatee, and a set-off was allowed; *Fair v. McIver*, 16 East, 130; *Boyd v. Mangles*, 16 M. & W. 337; *Watts v. Christie*, 11 Beav. 546.

(*l*) *Ryall v. Larkin*, 1 Wils. 155, and Bull. N. P. 181.

(*m*) See *Ridout v. Brough*, Cowp. 133.

(*n*) *Staniforth v. Fellowes*, 1 Marsh. 184; *Thomason v. Frere*, 10 East, 418.

(*o*) See *ante*, book ii, ch. 3, § 2.

(*p*) *Ex parte Morier*, 12 Ch. D. 491; *Ex parte Soames*, 3 D. & C. 320; *Ex parte Twogood*, 11 Ves. 517; *Lanesborough v. Jones*, 1 P. W. 325.

(*q*) 11 Beav. 546.

ing to his credit to the credit of A. & Co. This, however, was not done. On the bankruptcy of the bankers it was held that A. & Co. could not set off what was due from them to the bankers against what was due from the bankers to A.

**Other illustrations of same principle.**—Again, if A. and B. are partners and C. is indebted to them, and A. and B. dissolve partnership, and its business is continued by B. and he becomes indebted to C., who is afterwards adjudged bankrupt, B. cannot set off his separate debt to C. against the debt due from C. to the late firm of A. and B. (*r*)

These principles apply where one partner only is bankrupt and his separate estate is more than sufficient to pay his separate debts. Even in such a case a debt due to him and the solvent partners jointly cannot be set off against a debt due by him alone. (*s*)

Moreover, where A., B. and C. are jointly indebted to D., who is himself indebted to A., B. and C. separately and on several accounts, D.'s separate demands against A., B. and C. \*respectively cannot be met by setting off [\*661] their respective proportions of the debt owing by them jointly to D. (*t*)

In connection with this subject it is necessary to advert to *James v. Kynnier*. (*u*) There A. and B. were jointly indebted to C., who required payment, or to be accommodated with a loan to the amount due to him. A. thereupon lent C. the amount due to him, and received his promissory note for it. C. became bankrupt, and it was held that the debt due from A. and B. had in fact been paid by A., and that both the promissory note given by C. and the security given to C. by A. and B. ought to be given up to be canceled. The case is one rather of payment than of set-

(*r*) *Ex parte* Ross, Buck, 125. be considered law. Neither can  
The marginal note in this case is *Ex parte* Edwards, 1 Atk, 100, be  
apt to mislead. relied upon.

(*s*) *Ex parte* Twogood, 11 Ves. (*t*) *Ex parte* Christie, 10 Ves. 105.  
517. *Ex parte* Quintin, 3 Ves. 248, (*u*) 5 Ves. 108.  
is opposed to this, but cannot now

off, and cannot be considered as opposed in principle to the rule that a joint debt cannot be set off against a separate debt, and *vice versa*.

**Agreements to set off joint against separate debts.**—It is hardly necessary to observe that an agreement to the effect that a joint shall be set off against a separate debt, or *vice versa*, is perfectly valid, and if duly entered into will be binding, notwithstanding the subsequent bankruptcy of the parties. (x) So, if parties choose to agree that demands which they would otherwise be entitled to set off shall be kept separate and distinct, and then bankruptcy ensues, the agreement will nevertheless be binding upon them, as has already been seen. (y)

**Application of doctrines of set-off to sureties.**—It remains to notice the application of the doctrine of mutuality of credit to the case of sureties. Where there are cross-claims between a creditor and his principal debtor, capable of being set off against each other, the surety of the debtor can in bankruptcy insist that these claims shall be set against each other, so that he may be exonerated if possible. (z)

A very remarkable extension of this principle was made in *Ex parte Stephens*. (a) In that case a lady was a [\*662] creditor of her \*bankers, although she did not know it, and she as surety for her brother joined him in a joint and several note to secure repayment of 1,000*l.* lent

(x) In *Kinnerley v. Hossack*, 2 bankruptcy. See *infra*, § 4; *Ex Taunt.* 170, there was such an *parte Salting*, 25 Ch. D. 148; *Ex agreement*. See, too, *Vulliamy v. parte Alston*, 4 Ch. 168.

(y) See acc. *Ex parte Flint*, 1 Swanst. 80, and *Young v. Bank of Bengal*, 1 Deac. 622, noticed *ante*, p. 656.

(z) *Ex parte Hanson*, 12 Ves. 346, and 18 id. 232. The equitable doctrines of marshaling apply in

(a) 11 Ves. 24. The circumstances of this case were peculiar. A gross fraud had been committed by the bankers on the sister, by inducing her to believe that they had bought stock for her as requested, when in point of fact they had done no such thing, but had applied her money to their own use.

him by the bankers. The bankers became bankrupt, and the assignees sued the brother alone upon the note; but Lord Eldon, upon the petition of the brother and the sister, stayed the action, and ordered that the money due on the note by the brother and his sister as his surety should be set off against the money owing by the bankrupts to the sister alone. (b)

Again, in *Ex parte Staddon*, (c) bankers advanced to a customer, A., 500*l.* on the security of his promissory note, and deposited this note and others with B. & Co. as a security for advances made by them. The bankers became bankrupt. At the time of their bankruptcy A. was the holder of their notes to the amount of 520*l.*, and B. & Co. had in their hands securities of the bankrupts more than sufficient to cover what was due from them for advances made to them by B. & Co. B. & Co. compelled A. to pay his promissory note, he being ignorant of the dealings between them and the bankers.

Subsequently, B. & Co., having been paid all that was due to them from the bankrupts, delivered up to the assignees the securities in their hands. It was held that, as between A. and the bankers, A. was entitled, first, to be repaid what he had paid to B. & Co. as their surety, and secondly, to set off what was due from him to the assignees on his promissory note the amount due to him from the bankrupts in respect of their notes in his hands.

**Thirdly, as to the notice of the act of bankruptcy.**—The language of the mutual credit clause precludes setting off a demand accruing against a bankrupt by reason of anything done after notice of an act of bankruptcy committed by him \*and available against him for adjudica- [\*663] tion. (d) Therefore, although where bankers first

(b) See, too, *Vulliamy v. Noble*, 3 Mer. 621. See the observations of the M. R. on this case and on *Ex parte Stephens* in *Middleton v. Pollock*, 20 Eq. 515.

(c) 3 M. D. & D. 356. Compare *Bolland v. Nash*, 8 B. & C. 105.

(d) *Ante*, p. 655; *Elliott v. Turquand*, 7 App. Ca. 79. And see *Hawkins v. Penfold*, 2 Ves. Sr. 550; *Vernon v. Hankey*, 2 T. R. 113.

stop payment and then commit an act of bankruptcy a holder of their notes can set off such of them as came to his hands before the act of bankruptcy, (*e*) he cannot set off those which came to his hands after that event, if he had notice of it. (*f*) So, if a person commits an act of bankruptcy which is known to his bankers, and they nevertheless afterwards honor his drafts, they cannot set off the payments in respect of them against the demand of the trustees for the balance standing to the credit of the bankrupt at the time the act of bankruptcy was committed. (*g*)

**Buying up bills of bankrupt.**— With a view to avoid paying debts to trustees in bankruptcy, recourse is frequently had by the debtors of a failing person to the expedient of buying up his acceptances in order to set them off against the sums which the purchasers owe him. If a debtor obtains the acceptances of his creditors in this way for himself, and without notice of any act of bankruptcy, the debtor will be able to set off the full amount of the acceptances, however little he may have paid for their purchase; (*h*) but it will be otherwise if he had notice of the act of bankruptcy; (*i*) or if he has obtained the acceptances, not *bona fide* to protect himself, but as a trustee for others, and in order to enable them to avail themselves of his right of set-off. (*k*)

4. *Of the time from which the title of the trustee dates.*

**Relation back of trustee's title.**— Under the old law the title of the assignee of a person adjudicated bankrupt on a creditor's petition dated not from \*the

(*e*) *Hawkins v. Whitten*, 10 B. & W. 266; *Tamplin v. Diggins*, 2 C. 217; *Dickson v. Cass*, 1 B. & Camp. 312.

Ad. 343; *Forster v. Wilson*, 12 M. & W. 191. (*h*) *Hawkins v. Whitten*, 10 B. & C. 217; *Dickson v. Cass*, 1 B. & Ad. 343.

(*f*) *Dickson v. Cass*, 1 B. & Ad. 343, where some only of the firm had committed acts of bankruptcy. (*i*) *Dickson v. Cass*, 1 B. & Ad. 343.

(*g*) *Vernon v. Hankey*, 2 T. R. 113, and 3 Bro. C. C. 313. See, *Bing. N. C. 71*; *Fair v. McIver*, 16 too, *Kynaston v. Crouch*, 14 M. & East, 130. (*k*) *Lackington v. Combes*, 6

time of adjudication, but from a time anterior thereto, viz., from the time of the commission of the earliest act of bankruptcy subsequent to the accrual of the petitioning creditor's debt. (*l*) As regards the bankrupt's personal property, whatever he was entitled to at that time or acquired subsequently (and before he obtained his certificate) became legally vested in his assignees; and as regards his real property, although the legal estate in it only vested in the assignees from the time of their appointment, still they could recover whatever might have been conveyed away by the bankrupt after the commission of any act of bankruptcy subsequent to the accrual of the petitioning creditor's debt. (*m*) To this rule, however, certain important exceptions (known as protected transactions) were introduced by statute in favor of persons dealing with bankrupts *bona fide* and without notice of any act of bankruptcy. The law upon this subject is now contained in the following enactments of the Bankruptcy Act, 1883:

**Relation back of trustee's title.**—§ 43. The bankruptcy of a debtor, whether the same takes place on the debtor's own petition or upon that of a creditor or creditors, shall be deemed to have relation back to, and to commence at, the time of the act of bankruptcy being committed on which a receiving order is made against him, or, if the bankrupt is proved to have committed more acts of bankruptcy than one, to have relation back to, and to commence at, the time of the first of the acts of bankruptcy proved to have been committed by the bankrupt within three months next preceding the date of the presentation of the bankruptcy petition; but no bankruptcy petition, receiving order or adjudication shall be rendered invalid by reason of any act of bankruptcy anterior to the debt of the petitioning creditor. (*n*)

**Protected transactions.**—§ 49. Subject to the foregoing provisions of this act with respect to the effect of bankruptcy on an execution or attachment, (*o*) and with respect to the avoidance of certain settle-

(*l*) *Cooper v. Chitty*, 1 Burr. 20, may relate back to an act of bankruptcy and note thereto in 1 Sm. L. C. ruptcy committed before the passing

(*m*) See 1 Griffith & Holmes' of the Bankruptcy Act. *Ex parte* Snowball, 7 Ch. 534.

(*n*) See *Allen v. Bonnett*, L. R. 5 (o) § 45, *infra*, p. 674.

Ch. 577. The title of the trustee

ments, (*p*) and preferences, (*q*) nothing in this act shall invalidate, in the case of a bankruptcy —

(*a*) Any payment by the bankrupt to any of his creditors.

(*b*) Any payment or delivery to the bankrupt.

[\*665] (*c*) Any conveyance or assignment by the bankrupt for valuable consideration.

(*d*) Any contract, dealing or transaction by or with the bankrupt for valuable consideration.

Provided that both the following conditions are complied with, namely:

(1) The payment, delivery, conveyance, assignment, contract, dealing or transaction, as the case may be, takes place before the date of the receiving order; and

(2) The person (other than the debtor) to, by or with whom the payment, delivery, conveyance, assignment, contract, dealing or transaction was made, executed, or entered into, has not at the time of the payment, delivery, conveyance, assignment, contract, dealing, or transaction, notice of any available act of bankruptcy committed by the bankrupt before that time. (*r*)

These provisions are practically sufficient to protect all honest dealings and transactions with bankrupts without notice of any act of bankruptcy.

**Notice.**—Notice of an act of bankruptcy within the meaning of these clauses is not confined to formal or even direct notice; a knowledge of facts from which an act of bankruptcy ought to be inferred is sufficient. (*s*)

**General rule applies save in the above excepted cases.**—Notwithstanding the protection afforded by the above enactments to persons dealing with or suing out execution against debtors *bona fide*, and without notice of acts of bankruptcy committed by them, the old doctrine of relation applies as rigorously as ever, save in the excepted cases. (*t*)

(*p*) § 47, *ante*, p. 654.

(*q*) § 48, *ante*, p. 628.

(*r*) A *bona fide* payment by an agent to his principal is not protected if the principal has committed an act of bankruptcy and the agent knows it when he pays the money. *Ex parte* Edwards, 13 Q. B. D. 747. Compare *Re Sinclair*, 15 id. 616.

(*s*) See *Ex parte* Snowball, 7 Ch. 584.

(*t*) See *Turquand v. Vanderplank*, 10 M. & W. 180; *Kynaston v. Crouch*, 14 M. & W. 266; *Cannan v. South Eastern Rail. Co.* 7 Ex. 851. It applied under 7 and 8 Vict. ch. 111, on the bankruptcy of companies. *Aitchison v. Lee*, 3 Drew. 636; *aff'd*, 3 Jur. N. S. 95.



**Acts of bankruptcy not excepted.**—As a rule that which is in itself an act of bankruptcy cannot be upheld as a *bona fide* payment, dealing or transaction within the meaning of the enactment above referred to. (*u*) But an execution levied by seizure and sale is not invalid by reason only of its being an act of bankruptcy. (*x*)

\*What is notice to a firm has been already alluded to. [*y*666]

**Consequences to partners of doctrine of relation back.**—The doctrine of relation back, with its exceptions, having been noticed in a general manner, it is proposed to examine its consequences as regards, first, bankrupt partners and persons dealing with them; secondly, solvent partners and persons dealing with them; and thirdly, creditors who have issued execution against the partnership assets.

(*a*) *Transactions with bankrupt partners.*

**Bankruptcy of partners determines their power to deal with the property of the firm.**—When a firm is adjudged bankrupt it is necessarily dissolved, and the power of its members to carry on its business is thereby determined. Moreover, if there has been a joint act of bankruptcy committed by all the partners (*e. g.*, by a conveyance of all their property), the title of the trustee will relate back as against all the partners to that time. But if there has been no joint act of bankruptcy, but each of the partners has committed an act of bankruptcy at a different time from the others, then peculiar difficulties arise; for, a certain time having elapsed between the first act of bankruptcy and the next, the *firm* cannot, during this time, be treated as if *it* had been bankrupt, but only as if one of its members had

(*u*) See *Bevan v. Nunn*, 9 Bing. 107.

(*x*) 46 and 47 Vict. ch. 52, § 46 (3). Section 4 (*e*) makes the execution an act of bankruptcy.

(*y*) *Ante*, pp. 141 *et seq.* If execution issues at the suit of several

persons jointly, and one of them has notice of an act of bankruptcy committed by the execution debtor, such notice avoids the execution as against the trustee. *Edwards v. Cooper*, 11 Q. B. 33.

been so. The consequences, therefore, of an adjudication against a firm, where each member has committed a separate act of bankruptcy at a different time from the others, are, so far as regards transactions with strangers, the same as if there had been a succession of adjudications against each member separately. (z) What these consequences are it is now proposed to examine.

**Bankruptcy of one partner determines his power to deal with assets.**—It has been already pointed out that the bankruptcy of one partner dissolves the firm. (a) Moreover, where one partner commits an act of bankruptcy, and is adjudged bankrupt, his power of trading and of [\*667] acting in his own right in the \*disposition of the property of the partnership is determined as from the date of the act of bankruptcy. Indeed, so far as he is concerned, he may be regarded as a sole trader whose power of dealing with property in his own right ceases on an act of bankruptcy. (b) On this ground, amongst others, the assignees, in *Hague v. Rolleston*, (c) recovered from a creditor of a firm goods of the firm transferred to him by the bankrupt after he had committed an act of bankruptcy, for the purpose, apparently, of preferring him to other creditors. On the same ground it was determined in *Thomason v. Frere* (d) that the indorsement of a partnership bill by two out of three partners conferred no title on the indorsee, the indorsement having been made after the two indorsers had committed acts of bankruptcy. (e) This case is very im-

(z) See, accordingly, *Fox v. Hunbury*, Cowp. 445; *Edwards v. Hooper*, 11 M. & W. 363.

(a) *Ante*, p. 649.

(b) See *per* Bayley, J., in *Harvey v. Crickett*, 5 M. & S. 341.

(c) 4 Burr. 2174. See, also, *Burt v. Moulton*, 1 Cr. & M. 525, a similar case.

(d) 10 East, 418.

(e) See, accordingly, *Burt v.*

*Moulton*, 1 Cr. & M. 525. It is said that partnership bills ought, in the case of the bankruptcy of one partner, to be indorsed by his trustee and the solvent partners. See *Abel v. Sutton*, 3 Esp. 108, and *Ramsbottom v. Lewis*, 1 Camp. 279. But it is clear that this is not necessary to enable a *bona fide* holder for value without notice to sue on the bill. See *Lacy v. Woolcott*, 2

portant, and is a clear authority for the proposition that when a partner becomes bankrupt all his authorities to bind the firm by dealings in the ordinary course of business are to be deemed as having been determined by the act of bankruptcy. (*f*)

This doctrine, however, must not be carried too far. It has already been seen that persons who hold themselves out as partners are liable for the acts of each other done in the ordinary course of business, although they may have been done without authority. On this principle it was held in *Lucy v. Woolcott* (*g*) that a solvent partner was liable to a *bona fide* holder of a bill fraudulently accepted in the name of the firm by a copartner who had previously committed an act of bankruptcy. The case was distinguished from *Thomason v. Frere* \*on the ground [\*668] that there the question was whether the property in the bill was in the assignees and the solvent partners, or in the person who had received it from the bankrupt, and that nothing was there decided, or meant to be decided, as to the liability of the firm to an innocent indorsee for value. (*h*)

In conformity with the principle acted upon in *Hague v. Rolleston* and *Thomason v. Frere*, it was held in *Craven v. Edmondson* (*i*) that where a partner, after he had committed an act of bankruptcy, paid to a creditor, who was aware of that fact, a debt owing to him by the firm, and afterwards the other partners committed acts of bank-

D. & R. 458; *Ex parte Robinson*, 3 D. & Ch. 376, and C. P. Cooper, Ca. in Ch. temp. Brougham, 162.

(*f*) *A fortiori* is a bill given by him in the name of the firm for his separate debt invalid as against the payee. *Heilbut v. Nevill*, L. R. 4 C. P. 354, and 5 *id.* 478.

(*g*) 2 D. & R. 458.

(*h*) In *Ex parte Robinson*, 3 D. & Ch. 376, the firm was held liable on the indorsement of the solvent

partner after an act of bankruptcy committed by his copartner. See the judgment in C. P. Coop. Ca. in Ch. temp. Brougham, 162, *infra*, p. 673.

(*i*) 6 Bing. 734. *Dickson v. Cass*, 1 B. & Ad. 343, was a very similar case, except that the creditor had not notice of the act of bankruptcy, and he was accordingly protected by statute.

ruptcy, whereupon the firm was adjudged bankrupt, the assignees were entitled to recover back the money so paid. The decision on this case was rested entirely on the ground that the agency of the partner who paid the money was determined by the act of bankruptcy committed by him; whilst the creditor, having had notice of that act, could not avail himself of the statutory enactments relating to *bona fide* dealings and payments, and which have been already adverted to.

**Payments made to bankrupt partner.**—Under the old law, if a debtor to a trader who had committed an act of bankruptcy paid the debt to him, his assignees could compel the debtor to pay them again; (*j*) and this is still the case if the debtor makes the payment after a receiving order has been made, or after he has notice that an available act of bankruptcy has been committed. (*k*) Nevertheless a trader who has committed an act of bankruptcy can compel his debtors to pay him, so long as no receiving order has been made against him. (*l*) This state of the law is most distressing; for if a debtor knows that [\*669] an act of bankruptcy has been committed by his creditor within three months, and is pressed for payment, if he pays he runs the risk of being compelled by the trustee to pay again; and if he refuses he renders himself liable to pay the costs of an action brought against him by his creditor. A debtor to a firm, one of the members of which is known to have committed an act of bankruptcy, should therefore pay the solvent partners. (*m*)

(*b*) *Transactions with solvent partners*

**Effect of bankruptcy of one partner on the solvent partners.**—The bankruptcy of any one partner, his co-

(*j*) See *Vernon v. Hankey*, 2 T. R. 181; *Foster v. Allanson*, 2 T. R. 118. 479.

(*k*) 46 and 47 Vict. ch. 52, § 49, (*m*) See below. Money ordered and *ante*, pp. 664, 665. to be paid to a firm by the court of

(*l*) *Prickett v. Down*, 3 Camp. admiralty is payable to the solvent  
1452

partners remaining solvent, affects them in no other way than this, viz., that the trustee in bankruptcy becomes tenant in common with them of the partnership property, and is entitled to have the accounts of the partnership taken, and to receive the bankrupt's share, whatever that may be. (*n*)

**Solvent partners entitled to wind up the business of the firm.**—The trustee, as has been already observed, does not become partner in the firm. The solvent partners are entitled to get in the joint assets; (*o*) and unless there be some misconduct on the part of the solvent partners, or unless the solvent partners are dead or abroad, the trustee has no right to interfere in the winding up or management of the partnership business. If he does he will be restrained by injunction at the instance of the solvent partners. (*p*)

**Trustee has no right to the partnership books.**—The trustee, moreover, cannot compel the solvent partner to deliver up the books of the partnership. (*q*) However, in a case where two persons were in partnership as solicitors, and one of them became bankrupt, and his assignees excluded the solvent partner from all interference in the partnership affairs, and got possession of \*the [\*670] deeds and documents belonging to the clients of the firm, a motion by the solvent partner for delivery to him of such deeds and documents was refused upon the ground that without the consent of the clients the court had no right to order their papers to be delivered to one partner only. (*r*)

partners after the bankruptcy of one of the firm. The *Jefferson*, 1 Rob. 325. of the high court. 46 and 47 Vict. ch. 52, §§ 93–102.

(*n*) See *ante*, pp. 340, 649.

(*o*) *Ex parte Owen*, 13 Q. B. D. 113. (*q*) *Ex parte Finch*, 1 D. & Ch. 274. See, also, *Ex parte Good*, 21 Ch. D. 868.

(*p*) See *Allen v. Kilbre*, 4 Madd. 464. The court in bankruptcy can now do this, and it is not necessary to proceed in the chancery division (*r*) *Davidson v. Napier*, 1 Sim. 297. Surely the solvent partner had more right to them than the assignees.

**But they have a right to see them.**—But although the trustee of one partner has no right to the custody of the partnership books, the solvent partners can be summoned before the court, and be compelled to produce them, and to answer questions relative to the dealings of the bankrupt, (s) although it may not even be alleged that there is anything due to him from the firm. (t)

**And to bring actions to recover partnership debts.**—The trustee has power, with the leave of the court, to bring actions in the names of himself and of the solvent partners; indemnifying the latter, however, against costs, if their names are used only for the sake of form, and they claim no benefit from the action. (u) So the solvent partners may use the name of the trustee upon indemnifying him if he declines to take any active part in the proceedings; (v) but they may sue on contracts without joining the bankrupt. (w)

**Solvent partner will be appointed receiver.**—If disputes as to the management of the partnership affairs arise between the trustee and the solvent partners, and there is no reason for distrusting the latter, the court will appoint one of them receiver of the partnership property, directing him to give security, to pass his accounts, and to furnish the trustee with proper accounts, and to allow him at all reasonable times to inspect the partnership books. (x)

**Right to wind up the affairs of the firm personal to the solvent partners.**—The power of the solvent partners to wind up the affairs of the partnership is, however, personal to themselves, and arises from the

(s) See 46 and 47 Vict. ch. 52, § 27; (v) *Ex parte* Owen, 13 Q. B. D. Bank. Rules, 1886, rr. 69 and 70; 113; *Whitehead v. Hughes*, 2 Cr. *Ex parte* Trueman, 1 D. & C. 464. & M. 318, and 2 Dowl. Pr. Ca. 258,

(t) *Ex parte* Levett, 1 Gl. & J. 185. and 4 Tyr. 92.

(u) See 46 and 47 Vict. ch. 52, § 113. See *Ex parte* Wilson, 2 (w) 46 and 47 Vict. ch. 52, § 114. (x) See *Ex parte* Stoveld, 1 Gl. Deac. 387, and 3 M. & A. 219, as to & J. 303; *Freeland v. Stansfeld*, 2 general orders authorizing assignees to sue. Sm. & G. 479.

confidence originally placed in them by the bankrupt, and which is continued to be placed in them by the court so long as there is no reason to the contrary. The right cannot be transferred; and therefore, where partnership goods were seized by the sheriff under an execution against a solvent partner, and the execution creditor purchased from the sheriff all the execution debtor's share and interest in the partnership, and then proceeded to sell the partnership effects, an injunction restraining such sale was granted by the court of chancery at the suit of the assignees of the other partner, who was bankrupt. (*y*)

If there is only one partner living in this country, his co-partners being either dead or abroad, and he becomes bankrupt, the trustee in that case winds up the affairs of the partnership as well as the private affairs of the bankrupt. (*z*)

**Sales, etc., by solvent partners.**—Notwithstanding the doctrine that by an adjudication of bankruptcy against one partner the firm is dissolved, and the trustee of the bankrupt partner becomes tenant in common of the partnership effects with the solvent partners, they can sell the partnership goods and chattels, and the trustee of the bankrupt partner has no *locus standi* against a *bona fide* purchaser from them. (*b*) In *Fox v. Hanbury*, (*c*) the leading case on the subject, one of several partners became bankrupt; afterwards partnership goods were *bona fide* sold to the defendant by the solvent partners, and after the sale the firm was adjudged bankrupt; the assignees of the firm sought to recover the goods from the purchaser upon the ground that, by the bankruptcy of one of the partners, the firm was dissolved, and the solvent partners had no power afterwards to dispose of the partnership effects. Lord Mansfield, in a most carefully considered judgment, held that

(*y*) *Fraser v. Kershaw*, 2 K. & J. 496.

(*z*) See *Hankey v. Garratt*, 1 Ves. Jr. 236; *Everett v. Backhouse*, 10 Ves. 98; *Barker v. Goodair*, 11 Ves. 86; *Dutton v. Morrison*, 17 Ves. 210.

(*b*) *Sed quære* if they are only partners in the profits, see *Meyer v.*

*Sharpe*, 5 Taunt. 74.

(*c*) Cowp. 445. See, also, *Smith v. Stokes*, 1 East, 363; *Smith v. Oriell*, 1 East, 368.

the action would not lie; and for two reasons, viz.: [\*672] First, upon the broad ground that, after a \*partnership had been dissolved by the bankruptcy of one partner, persons who had dealt with the other partners without notice of the dissolution acquired a right against the solvent partners and the assignees of the bankrupt partner; and secondly, upon the technical ground that the assignees could not claim to be more than tenants in common with the purchaser, and that *trover* would not lie at the suit of one tenant in common against his co-tenant, unless under very special circumstances.

In *Harvey v. Crickett*, (d) which was not an action of *trover*, but *assumpsit for money had and received*, the plaintiffs, as assignees of a bankrupt partner, sought to recover from the defendant, creditors of the firm, money paid to them by the solvent partner after the act of bankruptcy; but it was held that the action would not lie; not, however, because the plaintiff and the defendant were tenants in common, but because, notwithstanding the bankruptcy of one of the partners, the other was entitled to apply the partnership assets in payment of the partnership debts.

Again, in *Morgan v. Marquis*, (e) the assignees of a bankrupt partner sought to recover from the agent of the firm moneys received by him from the sale of goods effected by him after the bankruptcy by the desire of the solvent partner; but it was held that the action would not lie, because it was competent for the solvent partner to deal with the property as he had done.

**Principle and effect of foregoing cases.**—These cases have been referred to thus in detail in order to show that they rest on something more satisfactory than the technical

(d) 5 M. & S. 336. *Woodbridge v. Swann*, 4 B. & Ad. 633, and *Smith v. Goddard*, 3 Bos. & P. 465, are nearly similar cases, and in them there was notice of the bankruptcy.

(e) 9 Ex. 145. See, also, *Lewis v. White*, 2 N. R. 81, Ex., where the assignee sued an auctioneer in *trover* for partnership property sold by the orders of the solvent partners.



doctrine that trover will not lie by one tenant in common against the other. Although this doctrine was, no doubt, sufficient for the decision of *Fox v. Hanbury*, *Smith v. Stokes*, and *Smith v. Oriell*, and was apparently thought by the court of exchequer, in *Buckley v. Barber*, (*f*)

to afford the \*only reason by which those decisions [\*673] could be justified, yet it is submitted that those cases, together with the others just referred to, are, in fact, authorities for the proposition that, notwithstanding the bankruptcy of one partner, the solvent partners can deal with the partnership property as if no bankruptcy had intervened, and can consequently confer a title, not only to an undivided share in, but to the whole of, any of the property which they assume to dispose of in the ordinary way of business, and to persons dealing with them *bona fide*. (*g*)

The case of *Ex parte Robinson* (*h*) goes the whole length of the doctrine here contended for. There A. and B. were partners. A. committed an act of bankruptcy, and afterwards B. accepted bills in the name of the firm as a security for a previously contracted obligation. On the subsequent bankruptcy of B. it was held that the holders of these bills were entitled to prove against the joint estate of A. and B.; for, as between the firm and *bona fide* holders of the bills for value, B.'s authority to accept them for himself and copartner and for a partnership debt could not be disputed.

**Bill accepted in name of firm after its bankruptcy not bill of the firm for all purposes.**— But although a bill accepted by one partner in the name of the firm and after the

(*f*) 6 Ex. 182.

(*g*) See, accordingly, *Fraser v. Kershaw*, 2 K. & J. 496. See, also, *Tupper v. Haythorne*, before Sir Wm. Grant, and reported in a note in Gow, N. P. Rep. 135. See further on this subject generally, note 2 M. at p. 133 of the Appendix to 1 Mont. Part.

(*h*) 3 D. & Ch. 376, and 1 Mon. &

A. 18, reversing *Ex parte Ellis*, Mon. & Bl. 249; *Ramsbottom v. Duck*, 1 Mont. Part. App. note 2 M.; *Ramsbotham v. Cator*, 1 Stark. 228; *Ramsbottom v. Lewis*, 1 Camp. 279; and *Abel v. Sutton*, 3 Esp. 108, must be considered as overruled so far as they are inconsistent with the case in the text.

bankruptcy of one of its members is the bill of the firm, it is obviously a very different thing from the bill of a firm in which all the partners are solvent; and an agreement to exchange bills of a firm for something else is not performed by the delivery of bills of the firm after some or one of its members are bankrupt. This was the ground of decision in *Ex parte McGae*. (i) There A., B. and C. were bankers; D., a customer of the bank, was in the habit of receiving bills from various people; and it was agreed between [\*674] him and the bank that he should indorse and pay the bills into the bank and receive in exchange its notes. This agreement was acted on. A. and B. became bankrupt; but D., without knowledge of that fact, continued to pay in bills and to receive the notes of the bank. Afterwards C. became bankrupt; a joint adjudication was made against A., B. and C. It was held that their assignees were bound to return to D. the bills paid by him since the bankruptcy of A. and B.; for, although he had received notes for such bills, those notes were not such notes as he had stipulated for and was entitled to; they were notes, not of A., B. and C., but, in substance, of C. and the assignees of A. and B.

**Validity of acts of solvent partners not dependent on absence of notice of bankruptcy.**—It will have been observed that the validity of *bona fide* dealings of solvent partners after the bankruptcy of their copartners does not depend on the clause in the bankruptcy act relating to *bona fide* dealings and transactions with bankrupts without notice of any act of bankruptcy committed by them. That clause increases, but is not essential to, the safety of persons *bona fide* dealing with partners who have committed no act of bankruptcy. *Harvey v. Crickett* (k) and *Woodbridge v. Swann* (l) are conclusive on this head.

(i) 19 Ves. 606. See, too, *Jombart v. Woollett*, 2 M. & Cr. 389.

(k) 5 M. & S. 336; and *ante*, p. 628, note (l) and 672.

(l) 4 B. & Ad. 633.

(c) *Execution creditors.***Conflicting right of trustee and execution creditors.—**

Subject to the qualifications introduced by statute the title of an execution creditor was always liable to be overridden by the commission of an act of bankruptcy on the part of the debtor before the goods taken in execution were actually sold. (*m*)

The statutory enactment now in force is 46 and 47 Victoria, chapter 52, sections 45 and 46, which are as follows. It will be observed that there is no distinction between traders and non-traders.

**Restriction of rights of creditor under execution or attachment.**—§ 45. (1) Where a creditor has issued execution against the goods or lands of a debtor, or has attached any debt due to him, he shall not be entitled to retain the benefit of the execution or attachment against the trustee in bankruptcy of the debtor, unless he has completed the execution or attachment before the date of the receiving order, and before notice of the presentation of any bankruptcy petition [\*675] by or against the debtor, or of the commission of any available act of bankruptcy by the debtor.

(2) For the purposes of this act an execution against the goods is completed by seizure and sale; an attachment of a debt is completed by receipt of the debt; and an execution against land is completed by seizure, or, in the case of an equitable interest, by the appointment of a receiver. (*n*)

**Duties of sheriff as to goods taken in execution.**—§ 46. (1) Where the goods of a debtor are taken in execution, and before the sale thereof notice is served on the sheriff that a receiving order has been made against the debtor, the sheriff shall, on request, deliver the goods to the official receiver or trustee under the order, but the costs of the execution shall be a charge on the goods so delivered, and the official receiver or trustee may sell the goods or an adequate part thereof for the purpose of satisfying the charge.

(2) Where the goods of a debtor are sold under an execution in respect

(*m*) See *Cooper v. Chitty*, 1 Sm. L. C. and note there.

(*n*) *Heathcote v. Livesley*, 19 Q. B. D. 285. See *Re Hobson*, 33 Ch. D. 493, as to elegit. See as to protected seizures not being executions, *Ex parte Dickin*, 4 Ch. D. 524, and *Krehl v. Great Central*

*Gas Co.*, L. R. 5 Ex. 289. A winding-up order, followed by the appointment of an interim manager, was not an execution or attachment within the meaning of section 133 of the act of 1849. *Aitchison v. Lee*, 3 Drew, 637, 653, etc.; aff. 3 Jur. N. S. 95.

of a judgment for a sum exceeding £20, the sheriff shall deduct the costs of the execution from the proceeds of sale and retain the balance for fourteen days, and if within that time notice is served on him of a bankruptcy petition having been presented against or by the debtor, and the debtor is adjudged bankrupt thereon or on any other petition of which the sheriff has notice, the sheriff shall pay the balance to the trustee in the bankruptcy, who shall be entitled to retain the same as against the execution creditor, but otherwise he shall deal with it as if no notice of the presentation of a bankruptcy petition had been served on him.

(3) An execution levied by seizure and sale on the goods of a debtor is not invalid by reason only of its being an act of bankruptcy, and a person who purchases the goods in good faith under a sale by the sheriff shall in all cases acquire a good title to them against the trustee in bankruptcy.

**Case where some partners are abroad.**—The above clauses apply as well to cases where one partner is bankrupt, and the same partner is the execution debtor, as to those where all the partners are bankrupt and all are execution debtors; it will also be probably held to apply where one partner only is bankrupt and the execution is against the firm for a partnership debt; (o) provided the court is in a position to insure a proper distribution of the assets of the firm amongst the creditors thereof. But if a firm carries

on business and has property abroad, and some of [\*676] the partners are resident \*there, and a creditor has, by proceedings instituted abroad against the foreign house, taken its effects there in execution, he will not be interfered with by the courts here at the instance of the trustee of a bankrupt member of the firm residing in this country. (p) As the court in such a case cannot insure a proper distribution of the partnership assets amongst all the creditors of the firm, it will not deprive any of those creditors of the advantages which they may have obtained and to which they are entitled by the laws of another country.

(o) Following the analogy of the old law, see *Barker v. Goodair*, 11 Ves. 78, and *Dutton v. Morrison*, 17 Ves. 210. See, too, *Re Wait*, 1 J. & W. 610; *Anon.* 12 Mod. 446. Mer. 279. See, too, the excellent judgment of C. J. Eyre, in *Phillips v. Hunter*, 2 H. Bl. 410, and the case of *Waring v. Knight*, referred to by him.

(p) See *Brickwood v. Miller*, 3

If, however, the creditor has received more than the amount of his debt, he will be made to account to the trustee for the difference. (*g*)

**Right of trustee to part of proceeds of sale under execution.**—Before the Judicature Acts it was held that where A. and B. were partners, and A. committed an act of bankruptcy, and a separate creditor of B. took the partnership property in execution and sold it, A.'s trustee, although not entitled to recover the property sold, or its value, was entitled to part of the proceeds of its sale; and, in the absence of evidence to the contrary, to one-half of such proceeds. (*r*) If, however, the trustee of a bankrupt firm sold its property, a creditor who had previously issued execution against that property for a separate debt of one of the partners could not sue the trustees for that partner's share of the proceeds of the sale. (*s*) The effect of the Judicature Act on such cases as these has been already considered. (*t*)

### SECTION III.—OF THE DOCTRINE OF REPUTED OWNERSHIP.

#### 1. *Generally.*

**Reputed ownership.**—From the time of James the First, and since, it has been thought proper by the legislature to declare that upon the bankruptcy of any [\*677] trader his creditors shall have the benefit not only of his own property, but also of all such goods of other people as at the time of his bankruptcy are in his possession, order or disposition, with their permission. Under the old acts such property did not, like the bankrupt's own property, *vest* in the assignees; but an order for sale was made, and when made was retrospective, and enabled them or the purchaser from them, as the case might be, to sue

(*g*) *Brickwood v. Miller*, 3 Mer. 229. Compare *Morgan v. Marquis*, 284. 9 Ex. 145.

(*r*) *Mayhew v. Herrick*, 7 C. B. (s) *Garbett v. Veale*, 5 Q. B. 408.

(*t*) *Ante*, book iii, ch. 5, § 4.

for the goods. (u) Under the Bankruptcy Act, 1883, however, this distinction does not appear to exist. (x)

**Object of above enactments.**—The object of these enactments is to prevent a trader from obtaining undue credit by being allowed to parade, as his own, property which in fact belongs to other people; and notwithstanding the very general language of the enactments, their application has always been controlled by a reference to the mischief which they were designed to prevent; and as the habits of a trading community vary, it may well happen that circumstances which are at one time calculated to deceive are not so at another. Whether, therefore, property in the possession of a bankrupt, but not belonging to him, will pass to his trustee by virtue of the doctrine of reputed ownership, will depend upon the circumstances under which, and the purposes for which, they are in his possession. (y)

By the Bankruptcy Act, 1883, the reputed ownership clause is as follows: Section 44 enacts that the property of a bankrupt divisible amongst his creditors shall include:

(iii) All goods being at the commencement of the bankruptcy in the possession, order or disposition of the bankrupt, in his trade or business, by the consent and permission of the true owner, under [\*678] such circumstances that he is the reputed owner thereof; provided that things in action other than debts due or growing due to the bankrupt in the course of his trade or business shall not be deemed goods within the meaning of this section. (z)

(u) The order might be made retrospectively, as in *Re Heslop*, 1 De G. M. & G. 477. See, as to the order for sale, *Quartermaine v. Bittleston*, 13 C. B. 133; *Freshney v. Carrick*, 1 H. & N. 653; and as to its conclusiveness, *Graham v. Furber*, 14 C. B. 134; *Ex parte Wood*, 4 De G. M. & G. 861; and as to restraining a sale under it, *Mather v. Lay*, 2 J. & H. 374.

(x) 46 and 47 Vict. ch. 52, § 44 (i.i) and § 54.

(y) See as to customs of trade,

etc., *Ex parte Brooks*, 23 Ch. D. 261; *Ex parte Turquand*, 14 Q. B. D. 636; *Ex parte Wingfield*, 10 Ch. D. 591; *Ex parte Vaux*, 9 Ch. 602; *Ex parte Watkins*, 8 id. 520; *Priestley v. Pratt*, L. R. 2 Ex. 101; *Ryall v. Rowles*, 1 Ves. Sr. 348; *Joy v. Campbell*, 1 Sch. & Lef. 328; *Hamilton v. Bell*, 10 Ex. 545; *Horn v. Baker*, 9 East, 215, and 2 Sm. L. C.

(z) 46 and 47 Vict. ch. 52, § 44 (iii). And see section 168 for the

definition of goods and property.

Upon this enactment the following observations require attention:

**First, as to the property.**—The reputed-ownership clause does not extend to land or any interest therein; and not therefore to leaseholds, (*a*) equities of redemption, or the like; (*b*) nor to fixtures, even though removable as between landlord and tenant. (*c*) But with the exception of choses in action other than debts due to the bankrupt in respect of his trade or business, all pure personal estate is included in the clause. (*d*) It includes, for example, ships, notwithstanding the registry acts. (*e*)

**Choses in action.**—Debts due to the bankrupt in respect of his trade or business (*f*) are within the operation of the clause. But all other choses in action are excepted, *e. g.*, debentures, (*g*) policies of insurance, (*h*) shares in partnerships, (*i*) shares in companies (*k*) and equitable interests therein. (*l*)

(*a*) *Roe v. Galliers*, 2 T. R. 133.

(*b*) *Jones v. Gibbons*, 9 Ves. 407.

But as to money directed to be raised by sale or mortgage, see *Re Hughes*, 2 Hem. & M. 89.

(*c*) *Horn v. Baker*, 9 East, 215, and 2 Sm. L. C.; *Whitmore v. Empson*, 23 Beav. 313; *Mather v. Fraser*, 2 K. & J. 536; *Ex parte Scarth*, 1 M. D. & D. 240; *Ex parte Cotton*, 2 id. 725; *Boydell v. McMichael*, 1 Cr. M. & R. 177; *Ex parte Wilson*, 4 D. & C. 143.

(*d*) See *Ryall v. Rowles*, 1 Ves. Sr. 348, as to debts; *Hornblower v. Proud*, 2 B. & Ad. 329, as to negotiable instruments; *Edwards v. Martin*, 1 Eq. 121.

(*e*) *Monkhouse v. Hay*, 2 Brod. & Bing. 114, affirming *Hay v. Fairbairn*, 2 B. & A. 193; *Robinson v. MacDonnell*, 5 M. & S. 228; *Ex parte Burn*, 1 Jac. & W. 378; *Ex*

*parte Batson*, Cooke's Bank. L. 355, ed. 8.

(*f*) *I. e.*, debts connected with his trade, not all debts contracted whilst he is a trader. See *Ex parte Rensburg*, 4 Ch. D. 685; *Ex parte Kemp*, 9 Ch. 383.

(*g*) *Ex parte Rensburg*, 4 Ch. D. 685.

(*h*) *Ex parte Ibbetson*, 8 Ch. D. 519.

(*i*) *Ex parte Fletcher*, 8 Ch. D. 218. See, also, *Longman v. Tripp*, 2 Bos. & P. N. S. 67; *Ex parte Foss*, 2 De G. & J. 230.

(*k*) *Whinney v. Colonial Bank*, 11 App. Ca. 426, reversing S. C. 30 Ch. D. 261, and overruling *Ex parte Union Bank of Manchester*, 12 Eq. 354. Older decisions may now be disregarded.

(*l*) *Ex parte Barry*, 17 Eq. 113.

[\*679] \*Secondly, as to the order and disposition.—

The act requires that the goods and chattels shall be in the bankrupt's possession, order or disposition as reputed owner. Goods, therefore, which are in the bankrupt's possession, but not as reputed owner, are not within the clause. (*m*) On the other hand, actual possession on the part of the bankrupt is not necessary. If the goods are in the hands of a servant of a bankrupt or in the possession of a third party to whom the bankrupt has lent them, and who is bound to return them when required, they are in the bankrupt's order and disposition. (*n*) But if goods are in the possession of a third party who is entitled to a lien upon them the trustee is not entitled to the goods as being in the bankrupt's possession. (*o*).

**Bills of sale.**—Nor does the registration of a bill of sale necessarily prevent the goods comprised in it from remaining in the order and disposition of the vendor or mortgagor. (*p*)

**As to debts.**—Debts are deemed to be in the possession, order or disposition of him who has the power of giving a valid discharge for the money payable in respect of them, and of transferring them in the market without exciting suspicion. Consequently a mere assignment of debts, although it may be valid enough between the assignor and the assignee, will not have the effect of taking them out of the order and disposition of the former. To effect this, notice of the assignment must be given to the debtor. (*q*)

(*m*) See *Priestly v. Pratt*, L. R. 2 Ex. 101, where the goods were left with the bankrupt for the owner's convenience. See, also, *Shrubsole v. Sussams*, 16 C. B. N. S. 452, where the bankrupt's name had been painted out from over his own shop.

(*n*) *Hornsby v. Miller*, 1 E. & E. 192.

(*o*) See *Greening v. Clarke*, 4 B. & C. 316; *Ex parte Arbouin*, De G.

359; *Ex parte Taylor*, Mont. 240. And compare *Hoggard v. Mackenzie*, 25 Beav. 493, where the person setting up the lien was only a servant of the bankrupts.

(*p*) *Badger v. Shaw*, 2 E. & E. 472; *Stansfeld v. Cubitt*, 2 De G. & J. 222. Compare *Ex parte Hooman*, 10 Eq. 63; *Ashton v. Blackshaw*, 9 Eq. 510.

(*q*) *Ryall v. Rowles*, 1 Ves. Sr. 348; *Ex parte Monro*, Buck, 300.



**As to the sufficiency of the notice.**—What amounts to a sufficient notice of an assignment is often not easy to decide. It seems, however, that it is immaterial by whom the notice is given; (*r*) that a verbal communication, \*if given in the course of business, is as effect- [\*680] ual as a written notice; (*s*) that notice by advertisement, if seen by the person to whom notice ought to be given, is sufficient; (*t*) and that notice to one partner is notice to the firm; (*u*) and notice to one director or officer of a company, whose duty it is to receive it and act upon it or communicate it to the company, is notice to the company, (*x*) provided that such director or officer is not the person whose interest in the company is the subject-matter of the transaction to be notified. (*y*)

**Notice of dissolution of partnership.**—Notice of a dissolution of partnership and that one of the partners will receive and pay all debts is not notice that he alone is entitled to receive payment of the debts due to the firm, and is therefore insufficient to take such debts out of the reputed ownership of the firm. (*z*)

(*r*) See *Ex parte* Agra Bank, 3 C. P. 319; *Browne v. Savage*, 4 Ch. 555; *Re Rawbone*, 3 K. & J. Drew. 635; *Ex parte* Richardson, 300; *Re Langmead*, 20 Beav. 20. M. & Ch. 43; *Gale v. Lewis*, 9 Q. B.

(*s*) *Alletson v. Chichester*, L. R. 10 C. P. 319; *Ex parte* Agra Bank, 3 Ch. 555; *North British Insur. Co. v. Hallett*, 7 Jur. N. S. 1263; *Re Shelley*, 4 De G. J. & S. 543; *Ex parte* Richardson, M. & Ch. 43; *Gale v. Lewis*, 9 Q. B. 730. Mere casual knowledge by a secretary is, however, not enough. *Société Générale de Paris v. Tramways Union Co.* 14 Q. B. D. 424, and 11 App. Ca. 20; *Re Barr's Trust*, 4 K. & J. 219; *Ex parte* Watkins, 2 M. & A. 348; *Ex parte* Burbridge, 1 Deac. 131; *Edwards v. Martin*, 1 Eq. 121.

(*t*) *Lloyd v. Banks*, 3 Ch. 488. (*y*) *Browne v. Savage*, 4 Drew. 635; *Ex parte* Nutting, 2 M. D. & D. 302; *Ex parte* Boulton, 1 De G. & J. 163. Compare *Re Shelley*, 4 De G. J. & S. 543; *Duncan v. Chamberlayne*, 11 Sim. 123; *Thompson v. Spiers*, 13 Sim. 469; *Ex parte* Wilkinson, id. 475. *Ex parte* Rose, 2 M. D. & D. 131, must be considered overruled.

(*z*) *Ex parte* Burton, 1 Gl. & J. 207; *Ex parte* Osborne, id. 358; *Ex parte* Sprague, 4 De G. M. &

**Thirdly, in his trade or business.**—The act requires that the goods shall be in the possession, etc., of the bankrupt, in his trade or business. This is important. What is in a person's trade or business depends on what he trades in or what his business is, and on where the particular goods are. (*a*)

**Fourthly, as to the time of possession.**—The [\*681] reputed-ownership \*clause only extends to goods and chattels in the bankrupt's order and disposition at the time of the commission of the act of bankruptcy to which the adjudication relates. (*b*) Therefore, although such property may have been left in the bankrupt's order and disposition for a long time, and although he may thereby have acquired a false credit, still, if before he has committed an act of bankruptcy they have been taken out of his order and disposition, his trustee will have no claim to them. (*c*)

In a case where the goods of one partner were in the order and disposition of the firm, but were insured in the name of their owner, and the goods were burnt, and afterwards the firm became bankrupt, the proceeds of the policy were held not to form part of the joint estate of the firm, although the goods themselves would have done so had they continued undestroyed. (*d*)

**Bona fide dealings without notice of bankruptcy.**—The effect of removing goods from the order and disposition of a bankrupt after he has committed an act of bankruptcy turns on the *bona fides* of their owner and on his knowledge

G. 866. Compare *Ex parte* Woodgate, 2 M. D. & D. 394.

(*a*) See *Ex parte* Lovering, 24 Ch. D. 31; *Ex parte* Sully, 14 Q. B. D. 950. See, also, *Colonial Bank v. Whinney*, 30 Ch. D. 261; *Ex parte* Nottingham Bank, 15 Q. B. D. 441.

(*b*) See 46 and 47 Vict. ch. 52, §§ 43 and 44 (iii).

(*c*) See *Ex parte* Phillips, 4 Ch. D. 496; *Stansfeld v. Cubitt*, 2 De G. & J. 222; *Jones v. Dwyer*, 15 East,

21; *Smith v. Topping*, 5 B. & Ad. 674; *Price v. Groom*, 2 Ex. 542;

*Ex parte* Foss, 2 De G. & J. 230; *Sinclair v. Wilson*, 20 Beav. 324.

See, also, *Ex parte* Littledale, 6 De G. M. & G. 714; *Ex parte* Masterman, 4 D. & Ch. 751, which related to shares.

(*d*) *Ex parte* Smith, Buck, 149, and 3 Madd. 63. And see *Ex parte* Browne, 6 Ves. 136; *Ex parte* Parry, 5 id. 575.

or ignorance of the act of bankruptcy; for it is held that a removal of goods is a dealing or transaction within the meaning of the protecting clauses. (e) Consequently, although a person's goods and chattels may be with his consent in the order and disposition of a trader who commits an act of bankruptcy, yet if such person afterwards, *bona fide* and without notice of such act of bankruptcy, takes those goods out of the trader's order and disposition, they will be protected from the claims of his trustees. (f)

**\*Fifthly, as to the consent of the true owner.**— [\*682] Goods and chattels which, at the time of the commission of an act of bankruptcy by a trader, are in his order and disposition, in fraud of, or against, or without the will of, the true owner, are not within either the words or the spirit of the reputed-ownership clause. (g) After a *bona fide* demand by the owner to have the goods restored to him they cannot be said to remain with his consent, or by his permission, in the possession of the bankrupt; and although, therefore, they do continue in his possession until he becomes bankrupt, his trustee must restore them. (h)

**Who are considered true owners.**— The expression true owner includes creditors having an equitable or legal charge or lien upon goods and chattels left by their consent in the order and disposition of the bankrupt. (i) Consequently, the liens of such persons on goods so left are lost in the event of the bankruptcy of their debtor. (k)

(e) As to which, see *ante*, p. 664, and *Isitt v. Beeston*, L. R. 4 Ex. 159.

(f) *Re Styan*, 1 Ph. 105; *Graham v. Furber*, 14 C. B. 134; *Brewin v. Short*, 5 E. & B. 227. See, too, *Ex parte Dobson*, 2 M. D. & D. 685, and *Burn v. Carvalho*, 4 M. & Cr. 690.

(g) *Ex parte Ward*, 8 Ch. 144; *West v. Skipp*, 1 Ves. Sr. 239; *Ex parte Richardson*, Buck, 480. See, also, *Acraman v. Bates*, 2 E. & E. 456, as to goods at sea.

(h) *Ex parte Ward*, 8 Ch. 144; *Smith v. Topping*, 5 B. & Ad. 674; *Brewin v. Short*, 5 E. & B. 227; *Re Slee*, 15 Eq. 69. As to the effect of giving instructions to demand, see *Ex parte Phillips*, 4 Ch. D. 496.

(i) *Ryall v. Rowles*, 1 Ves. Sr. 348; *Hornsby v. Miller*, 1 E. & E. 192; *Re Slee*, 15 Eq. 69.

(k) See last note, and *Hoggard v. Mackenzie*, 25 Beav. 493. And see as to mortgages by deed, where the mortgagor retains possession, *Freshney v. Carrick*, 1 H. & N. 653;

**Cases to which the doctrines of reputed ownership do not apply.**—Having now alluded to the circumstances required to bring a case within the reputed-ownership clause, it is proposed to advert shortly to the non-application of that clause to property which, although apparently within its words, is not within its spirit.

**Property in possession of bankrupt for legitimate purposes.**—The doctrine of reputed ownership is confined to those cases in which possession of the goods by the bankrupt is not justified by any known custom of trade, (*l*) nor by any *bona fide* purpose requiring him to have them [\*683] under his control. (*m*) If, therefore, \*goods are intrusted to factors or brokers or known agents to be disposed of by them in the ordinary course of trade, and they become bankrupt, such goods do not pass to their trustees, for the possession of the goods was not calculated to deceive any one conversant with mercantile operations. (*n*)

**Trust property.**—So, again, property vested in one person in trust for another does not on the bankruptcy of the trustee become divisible amongst his creditors, either under the reputed-ownership clause or otherwise. (*o*) But the trust must be a *bona fide* trust, and not fraudulent, *i. e.*, not created for the purpose of giving the trustee the apparent ownership in order to conceal the true state of things. (*p*)

Spackman *v.* Miller, 12 C. B. N. S. 659, and *Ex parte* Harding, 15 Eq. 223, where the bill of sale was registered.

(*l*) *Ante*, p. 677, note (*y*).

(*m*) See *Priestley v. Pratt*, L. R. 2 Ex. 101; *Hamilton v. Bell*, 10 Ex. 545; *Joy v. Campbell*, 1 Sch. & Lef. 328; *Holderness v. Rankin*, 2 De G. F. & J. 258.

(*n*) See *Ex parte* Bright, 10 Ch. D. 566; *Ex parte* Wingfield, *id.* 591; *Ex parte* Flynn, 1 Atk. 185; *Collins v. Forbes*, 3 T. R. 316, and the cases in the last note. Compare *Ex parte* Buck, 3 Ch. D. 795,

where the bankrupt was not known to be a factor.

(*o*) 46 and 47 Vict. ch. 53, § 44, cl. 1; *Joy v. Campbell*, 1 Sch. & Lef. 328; *Ex parte* Geaves, 8 De G. M. & G. 291; *Bankhead's Trusts*, 2 K. & J. 560; *Ex parte* Gillett, 3 Madd. 28; *Ex parte* Martin, 19 Ves. 491; *Ex parte* Smith, 4 D. & Ch. 579.

(*p*) *Ex parte* Watkins, 2 M. & A. 348; S. C. *Ex parte* Burbridge, 1 Deac. 131, reversing *Ex parte* Watkins, 4 Deac. & Ch. 87. See, also, *Ex parte* Ord, 2 M. & A. 724; *Ex parte* The Lancaster Canal Co.

**Goods held for specific purpose.**—In conformity, however, with the general rule relating to trust property, where goods and chattels are in the hands of a bankrupt, in order that he may apply them for a specific purpose, *e. g.*, in payment of debts owing to him by the owner of the goods, the trustee in bankruptcy must so apply them, notwithstanding the reputed-ownership clause. (*q*)

## 2. Particularly as regards partners.

**Application of doctrine of reputed ownership to partners.**—The preceding general notice of the doctrine of reputed ownership will, it is hoped, suffice to render its application to partners readily intelligible. So far as partners are concerned, the doctrine in question derives its chief importance from the effect it produces on the distribution of their assets; for it \*results from the [\*684] reputed-ownership clause that, in the event of the bankruptcy of a firm, whatever is in the reputed ownership of the firm is distributable as its joint estate, whilst whatever is in the reputed ownership of some individual partner is distributable as his separate estate.

**Effect of doctrine on joint and separate estate.**—And this rule prevails over all others; for, when a case of reputed ownership is once established, it is not of the least consequence to whom the property in question really belongs. As an instance of this, reference may be made to *Ex parte Hare*, (*r*) in which furniture belonging to one partner only, but kept in the office of the firm, and used there as part of the partnership effects, was, on the bankruptcy of the firm, distributed as joint estate. The same principle, probably, led to the decision in *Ex parte Hunter*, (*s*) in which there

Mon. & Bl. 94; and further, as to secret trusts, *per* Lawrence, J., in *Horn v. Baker*, 9 East, 215, and 2 Sm. L. C. *per* Erskine. C. J. Sir J. Cross thought the furniture was in point of fact partnership property. Compare *Ex parte Murton*, 1 M. D. &

(*q*) *Ex parte Brown*, 3 M. & A. D. 252.  
471. See other cases, *ante*, p. 653. (*s*) 2 Rose, 382.

(*r*) 1 Deac. 16; 2 Mont. & A. 478,

were three partners, but one of them had no interest whatever in anything except the profits; it was contended that under these circumstances there was no joint property of the three, but it was held that the property of the two must be distributed as if it were the property of the three.

**Liens destroyed by doctrines of reputed ownership.**— Again, if goods and chattels are in the reputed ownership of one or more partners, the liens of the other partners upon such goods and chattels will be overridden in favor of the creditors of those in whose order and disposition the goods and chattels were at the time of the bankruptcy. (*t*) Thus, in the case of *Hoggard v. Mackenzie*, (*u*) where a Scotch firm had an establishment in London, which was conducted in its name by a manager who had a lien on the goods consigned to him by his principals for advances made by him, it was held, on the bankruptcy of the firm, that goods in the possession of the manager were in the reputed ownership of the firm, and that his lien could not prevail against the assignees.

**Possession of one partner generally possession of the firm.**— As a general rule, however, property of the firm in the possession of one partner for the purposes of the partnership is not in his order and disposition so as to form [\*685] part of his \*separate estate; he is himself a true owner and his possession is that of the firm. (*x*)

**No joint estate created where one partner only is bankrupt.**— But the doctrines of disputed ownership only apply to that which is in the order and disposition of a bankrupt; whilst, therefore, if one partner only is bankrupt the joint estate of the firm may possibly be treated as his separate estate by being in his order and disposition, (*y*) his separate estate cannot be treated as joint estate by reason of its

(*t*) See *Ryall v. Rowles*, 1 Atk. 184.

(*u*) 25 Beav. 493.

(*x*) See *infra* for cases showing this to be so.

(*y*) It cannot be so treated if the joint estate is in the joint possession of all the partners. *Ex parte Dorman*, 8 Ch. 51. See, also, *Ex parte Fletcher*, 8 Ch. D. 218.

being in the order and disposition of himself and his co-partners. (z)

The application of the doctrine of reputed ownership to partners seldom presents peculiar difficulties, except when there has been a change in the firm, or where there is a dormant partner; but its application in these cases requires special notice.

**First, where there has been a change in the firm.**— It follows from the principles examined in the preceding pages that a mere change in the firm, whether by the introduction of a new or the retirement of an old partner, does not necessarily cause a change in the reputed ownership of the property of the old firm.

**Property of old firm continuing in its reputed ownership.**— This is particularly true of debts owing to the old firm, and of merchandise belonging to it, but in the hands of third persons; and there is abundant authority to show that debts and goods left in the reputed ownership of the old firm, although in fact belonging to the new firm, must, in the event of bankruptcy, be treated as the joint estate of the old firm.

In *Ex parte Burton*, (a) a firm of three partners, A., B. and C., was dissolved. A. continued the partnership business, and the debts due to the firm were assigned to him by B. and C. The dissolution was advertised, and the advertisement stated that all debts by or to the firm would be paid or received by A. No other notice of A.'s exclusive title to the debts was given. A. became bankrupt, and shortly afterwards A., B. and C. became bankrupt. It was held that the debts assigned to A. \*were in [\*686] the reputed ownership of A., B. and C.; for although A., as a partner, was entitled to receive the debts without reference to the assignment, still, until notice of that assign-

(z) See *Ex parte Taylor*, 2 M. D. Hawtrey, 7 Jur. 71; *Ex parte Leaf*, & D. 753. 1 Deac. 176, where one member of

(a) 1 Gl. & J. 207. See, too, *Ex parte* the old firm had died.  
*parte* Usborne, id. 358; *Ex parte*

ment was given to the debtors, they were as much at liberty to pay their debts to B. or C. as to A.

So, in *Ex parte Sprague*, (b) a firm of A. and B. dissolved partnership; the dissolution was advertised in the *Gazette*; and the debtors of the firm were, by a circular, requested to pay their debts to A. The debts due to the firm were, in fact, awarded to A. by an arbitrator appointed by him and B. to determine the terms of dissolution. On the subsequent bankruptcy of A., and of A. and B., it was held that the debts due to A. and B. were in the order and disposition of the firm; for its debtors had had no notice that A. had become solely entitled to those debts, the circulars amounting to no more than a request that the debtors would pay their debts to A. on behalf of the firm.

So with goods. If one of two partners retires and assigns his share and interest in the partnership property to the other, and part of that property consists of goods in the docks or at a wharfinger's, and notice of the assignment is not given to the custodian of the goods, they will, on the bankruptcy of the two partners, be treated as forming part of the joint estate, and not as part of the separate estate of the partner to whom they were assigned. (c)

**Reputed ownership of old firm determined by notice.—**

On the other hand, if proper notice of a change of ownership is given, that which was the property of the old firm will become part of the estate of the new firm. Further, if A. is the owner of goods in the custody of a third person, and A. takes B. into partnership with him, and gives notice to such person to hold the goods for A. and B., instead of for A. as formerly, and then A. and B. become bankrupt, those goods will be treated as in the reputed ownership of A. and B., although B. may have been a merely nominal partner, having no share in the assets of the partnership; (d).

(b) 4 De G. M. & G. 866. Compare *Ex parte Woodgate*, 2 M. & D. 394, as to the sufficiency of the notice in this case. (c) *Ex parte Harris*, 1 Madd. 583. (d) *Ex parte Arbouin*, De Gex, 359.



nor will a lien on \*the goods in favor of the person [\*687] in whose possession they are affect the result as between the estates of A. and of A. and B. (e)

**Property of old firm not in the reputed ownership of continuing partners.**—It has already been seen that the doctrine of reputed ownership only applies where a bankrupt's possession of goods is not justified by any *bona fide* purpose requiring him to have them in his custody. (f) This principle is peculiarly applicable to partners; for the possession by one partner of the goods of the firm may be, and often is, perfectly justifiable; and if one partner only is in possession of partnership goods, and the circumstances are not such as to show that he is in exclusive possession for purposes unconnected with the partnership, those goods will not be treated as in his order and disposition. (g) In conformity with this principle, if a firm is dissolved and all its property is vested in one partner upon trust to pay the debts of the firm, and he becomes bankrupt, the property of the firm is not distributable as his separate estate, but retains its character of joint estate. (h) It is not even necessary that there should be any actual assignment to him upon an express trust; for if a firm is simply dissolved, and one partner continues in possession of its property, he is held to be in such possession on behalf of the firm, and for the purpose of winding up its affairs, until the contrary is proved. (i)

Thus, in the case of *Ex parte Cooper*, (k) A. and B. dis-

(e) *Ibid.*

(f) *Ante*, p. 682.

(g) *Ex parte Flynn*, 1 Atk. 185; *Ex parte Taylor*, Mont. 240, item 2d. Compare *Ex parte Brown*, 9 Ch. D. 389, where partnership goods were mortgaged by two partners, and one retired, and the mortgagee allowed the goods to remain with the continuing partner.

(h) *Copeman v. Gallant*, 1 P. W. 314. And see *Ex parte Martin*, 19

Ves. 491; *Ex parte Fell*, 10 id. 348; *Ex parte Pemberton*, 1 Deac. 421.

(i) *Ex parte Williams*, 11 Ves. 3; *Ex parte Taylor*, Mont. 240; *Ex parte Copeland*, 2 Mont. & A. 177. See, too, *Ex parte Vardon*, 2 M. D. & D. 694.

(k) 1 M. D. & D. 358. Compare *Graham v. McCulloch*, 20 Eq. 397, noticed *infra*, p. 689, where the bankrupt was in possession as purchaser.

solved partnership; a notice of the dissolution was inserted in the *Gazette*, and such notice stated that A. would receive and pay all debts. A. continued to carry on the [\*688] partnership \*business in the name of the old firm, and he had its property in his possession. On the subsequent bankruptcy of A. and B., four months after the dissolution, it was held that the property of the firm in A.'s possession was not to be considered as in his order and disposition.

**Nor in that of surviving partner.**—Where partnership property comes into the hands of one partner by survivorship, and that partner becomes bankrupt, very strong circumstances are required to show that such property is distributable as his separate, and not as joint, estate. (*l*) If he continues to carry on the business, contrary to the trust reposed in him, and against the consent of the persons interested in the estate of the deceased partners, it is clear that the reputed-ownership clause will not apply. (*m*)

**Difference where continuing partner carries on business for himself only.**—Where, however, a partnership is dissolved, and one of the partners continues to carry on the business on his own account, and not for the purpose of winding up the affairs of the concern, and where, from lapse of time or otherwise, there is evidence to show acquiescence in such a course of proceeding on the part of the retired partners, then the nature of the partnership property will be held to have been changed, either by virtue of a tacit agreement between the partners themselves or by virtue of the doctrine of reputed ownership; and, in either case, that which was the joint estate of all will be distributable as the separate estate of the continuing partner. (*n*) Thus, in

(*l*) See *Ex parte* Manchester Bank, 28. Compare *Ex parte* Taylor, 12 Ch. D. 917, and 13 *id.* 465, *sub* Mont. 240, noticed *infra*, p. 689.  
*nom.* *Ex parte* Butcher; Brett v. (*m*) *Ex parte* Butcher, 13 Ch. D. Beckwith, 3 Jur. N. S. 31, noticed 465; Stocken v. Dawson, 9 Beav. ante, p. 600; *Ex parte* Leaf, Mon. 239, and on appeal, 17 L. J. Ch. 282. & Ch. 662; *Ex parte* Heath, 4 Jur. (*n*) See *West v. Skip*, 1 Ves. Sr.

*Horn v. Baker*, (o) A., B. and C. dissolved partnership, and it was agreed that C. and a third person, D., should continue the business on their own account, and that they should pay an annuity to A., and, after his death, to his widow. The partnership property was not assigned to C. and D., but was allowed to remain in their possession for the purposes of their business; and, on their bankruptcy, such of the property as consisted of \*goods and chattels was [\*689] held to be in their order and disposition, with the consent of their true owner.

Again, in *Graham v. McCulloch*, (p) the plaintiff and the defendant were partners, and in a suit for dissolution, and under an order of the court, the plaintiff agreed to buy the business, and was let into possession as purchaser. Before the money was paid he became bankrupt, and it was held that the business assets belonged to his trustee as part of his estate, and that the partnership could only prove for the purchase money. The property purchased had, in fact, passed in equity to the bankrupt, who was a mere debtor for the price. The property was not in the order and disposition of the firm, but in his own order and disposition with the consent of his copartner.

**Case of surviving partner.**— Where the continuing partner is a surviving partner the doctrines of reputed ownership may apply, although, as before observed, under ordinary circumstances they do not. In *Ex parte Taylor*, (q) a debt due to a firm had, on the death of one of the partners, been compromised by the survivors, who, in lieu of payment, had accepted from the debtor two promissory notes and a policy of insurance, which, on their bankruptcy, were in their possession. The vice-chancellor (Shadwell) held that

242; *Ex parte Barrow*, 2 Rose, 252; property was in equity the bank-  
*Ex parte Fell*, 10 Ves. 347. See, rupt's; he was in possession, and  
 also, *Ex parte Hayman*, 8 Ch. D. 11. was debtor for the purchase money.

(o) 9 East, 215.

So in *Ex parte Assignees of Brewster and West*, 22 L. J. Bank. 62,

(p) 20 Eq. 397. The doctrine of reputed ownership seems hardly there cited.

applicable to such a case. The (q) *Mont.* 240, item No. 1.

the debt, having been compromised by the surviving partners, was within the statute.

**Secondly, where there is a dormant partner.**—The extent to which a dormant partner is affected by the doctrine of reputed ownership is by no means well settled. It was held in *Coldwell v. Gregory* (*r*) that if there was a partnership of two persons, one of whom was dormant, and the other of whom became bankrupt, the share of the former did not pass to the assignees of the latter; it being monstrous to deprive the dormant partner of his share in the partnership property, and yet leave him liable to all [\*690] the partnership creditors. This case, however, was generally considered as overruled by later authorities which were taken as having settled that, under the circumstances supposed, the whole partnership property was in the order and disposition of the bankrupt, within the meaning of the reputed-ownership clause, and was, therefore, distributable as if it belonged to him alone. (*s*) It naturally followed from this that if a dormant partner retired, and the other partners continued to carry on the business of the firm, and became bankrupt, the partnership property was in their order and disposition, although it was agreed that they should apply it in payment of the debts of the old firm. (*t*)

However, in *Reynolds v. Bowley*, (*u*) the court of exchequer chamber held that, where two partners carried on business in the name of one of them, the goods of the firm could not be treated, on the bankruptcy of that one, as in his order and disposition with the consent of the other partner. This decision, if based upon the ground that the so-called dormant partner was in joint possession with the bankrupt, offers no real difficulty; and the decision was

(*r*) 1 Price, 119, 130, and 2 Rose, 149. (*t*) *Ex parte Enderby*, 2 B. & C. 389, *Ex parte Chuck*, 8 Bing. 469;

(*s*) *Ex parte Dyster*, 2 Rose, 256; *Ex parte Jennings*, Mont. 45. *Ex parte Enderby*, 2 B. & C. 389; (*u*) L. R. 2 Q. B. 474, reversing *Ex parte Chuck*, Mont. 364, and 8 id. 41. See *ante*, p. 685, notes (*y*) Bing. 469; *Re Curry*, 12 Ir. Eq. 382. and (*z*).

based on this ground both by Willes, J., and Bramwell, B. But the majority of the court (*x*) based their judgment on the much broader ground that the reputed-ownership clause only applies where there is a true owner, and another person in possession with his consent; and that the clause has no application to cases where the person in possession is himself a joint owner, and is in possession by virtue of his ownership, and has as much right to possession as his co-owner.

In *Ex parte Hayman*, (*y*) however, property of a father was held to be in the reputed ownership of himself and his son, who was not a partner, but was liable to some creditors as if he were a partner. The father, who was the true owner, had \*allowed his property to be in the [\*691] reputed ownership of himself and son. The possession in this case was not in accordance with the title, whilst in *Reynolds v. Bowley* it was, and this seems to be the test in cases of this description.

In *Ex parte Wood*, (*z*) A. and B. were partners, carrying on business in the name of A. They dissolved partnership, and it was agreed that A. should receive and pay all debts, and should retain the stock-in-trade, and pay B. for his interest. A. continued to carry on business on his own account, and became bankrupt, and afterwards B. became bankrupt. It was held that all the partnership debts and stock-in-trade were in A.'s order and disposition, as reputed owner at the time of his bankruptcy, and were consequently distributable as his separate estate, although the dissolution of partnership had not been publicly made known.

**In the event of death of dormant partner.**—Where, however, a dormant partner is dead, that which the ostensible partner is entitled to receive or have in his possession as survivor cannot be said to be in his order and disposi-

(*x*) Kelly, C. B., and Byles, Keating and Smith, JJ. See the next case, in which their reasoning was not altogether approved. (*y*) 8 Ch. D. 11. See, also, *Rowland and Crankshaw*, 1 Ch. 421; *Ex parte Sheen*, 6 Ch. D. 235. (*z*) De Gex, 134.

tion with the consent of the true owner, (a) unless perhaps the executors of the deceased allow him to continue to carry on business with their testator's assets.

#### SECTION IV.—THE ADMINISTRATION OF BANKRUPT PARTNERS' ESTATES.

##### 1. *General principles.*

**Administration of estates of bankrupt partners.**—The principles according to which the property of bankrupt partners is distributed amongst the various persons having claims upon it have next to be considered. These principles are the same whether the estate to be administered is that of a single bankrupt partner or that of a [\*692] bankrupt firm. (b) \*Consequently, the present subject may be conveniently disposed of by examining the principles which apply to a joint adjudication against the firm, and by noticing, as may be required, such peculiarities as are met with when the bankruptcy is confined to one partner only.

**Joint estate to be distinguished from separate estate, and joint debts from separate debts.**—In administering the estate of a bankrupt firm or of some or one only of its members, it is necessary to distinguish accurately, first, joint from separate estate; and secondly, joint from separate debts: for the leading principle of administration is, if possible, to pay the debts of the firm (joint debts) out of the assets of the firm (joint estate), and the private debts of each partner (separate debts) out of his own private property (separate estate); in other words, to make each estate pay its own creditors. (c)

(a) See *Brett v. Beckwith*, 3 Jur. N. S. 31, and other cases cited *ante*, p. 688, note (l). having separate estate), and he carries on another business alone. *Re Childs*, 9 Ch. 508.

(b) The same principles apply where a husband and his wife carry on one business in partnership (she (c) *Ex parte Elton*, 3 Ves. 239. And see 1 Mont. Part. 110, note 2 D.; *Bank. Rules*, 1886, r. 293.

This rule, which has long been established, was clearly laid down by Lord King in *Ex parte Cooke* (d) in the following words: "It is settled, and is a resolution of convenience, that the joint creditors shall be first paid out of the partnership or joint estate, and the separate creditors out of the separate estate of each partner; and if there be a surplus of the joint estate besides what will pay the joint creditors, the same shall be applied to pay the separate creditors; and if there be, on the other hand, a surplus of the separate estate beyond what will satisfy the separate creditors, it shall go to supply any deficiency that may remain as to the joint creditors." (e)

The rule thus laid down by Lord King still prevails.

\*The Bankruptcy Act, 1883, enacts as follows: [\*693]

§ 40. (3) In the case of partners the joint estate shall be applicable in the first instance in payment of their joint debts, and the separate estate of each partner shall be applicable in the first instance in payment of his separate debts. If there is a surplus of the separate estates it shall be dealt with as part of the joint estate. If there is a surplus of the joint estate it shall be dealt with as part of the respective separate estates in proportion to the right and interest of each partner in the joint estate.

**Joint and separate dividends.**—§ 59. (1) Where one partner of a firm is adjudged bankrupt, a creditor to whom the bankrupt is indebted jointly with the other partners of the firm, or any of them, shall not receive any dividend out of the separate property of the bankrupt until

(d) 2 P. W. 500. See, too, *Twiss v. Massey*, 1 Atk. 67; *Ex parte Crowder*, 2 Vern. 706.

(e) The principle enunciated above was departed from by Lord Thurlow, who allowed joint and separate creditors to be paid *pari passu*. Lord Rosslyn restored the old rule, but allowed the joint creditors to be paid *pari passu* with the separate creditors out of the separate estate in case of there being no joint estate. The rule thus modified by Lord Rosslyn was adhered to by Lord Eldon, and has

not since been departed from. See *Ex parte Taitt*, 16 Ves. 193; 1 Mont. Part. 110, note 2 D., and 67, note Q.; *Cooke's Bank. Law*, 259 *et seq.*, ed. 8. See, for some reasons justifying the rule, *Lodge v. Prichard*, 1 De G. J. & S. 613, 614, *per* Turner, L. J. The rule is adhered to without reference to the actual advantage or disadvantage to the creditors in any particular case. See *Nanson v. Gordon*, 1 App. Ca. 195; *Ex parte Collinge*, 4 De G. J. & Sm. 533.

all the separate creditors have received the full amount of their respective debts.

(2) Where joint and separate properties are being administered, dividends of the joint and separate properties shall, subject to any order to the contrary that may be made by the court on the application of any person interested, be declared together; and the expenses of and incident to such dividends shall be fairly apportioned by the trustee between the joint and separate properties, regard being had to the work done for and the benefit received by each property.

And the Bankruptcy Rules, 1886 (like the older rules), require distinct accounts to be kept of the joint and separate estates. (f) The rule is as follows:

**Joint and separate estates accounts.**—293. Where a receiving order has been made against debtors in partnership, distinct accounts shall be kept of the joint estate and of the separate estate or estates, and no transfer of a surplus from a separate estate to the joint estate, on the ground that there are no creditors under such separate estate, shall be made until notice of the intention to make such transfer has been gazetted.

Further the Bankruptcy Rules, 1886, provide:

**Separate firms.**—269. If any two or more of the members of a partnership constitute a separate and independent firm, the creditors of such last-mentioned firm shall be deemed to be a separate set of creditors, and to be on the same footing as the separate creditors of any individual member of the firm. And where any surplus shall arise upon the administration of the assets of such separate or independent firm, the same shall be carried over to the separate estates of the partners in such separate and independent firm according to their respective rights therein.

[\*694] \*And as regards costs and remuneration of the trustee they also provide:

**Apportionment of costs between joint and separate estates.**—127. In the case of a bankruptcy petition against a partnership the costs payable out of the estates incurred up to and inclusive of the receiving order shall be apportioned between the joint and separate estates in such proportions as the official receiver may in his discretion determine.

**Costs out of joint or separate estates.**—128. (1) Where the joint estate of any co-debtors is insufficient to defray any costs or charges properly incurred prior to the appointment of the trustee, the official receiver

(f) Bank. Rules, 1886, r. 293. A general order applies. *Ex parte* petition that separate accounts may Green, 1 D. & C. 382.  
be kept is improper where the



may pay or direct the trustee to pay such costs or charges out of the separate estates of such co-debtors, or one or more of them, in such proportions as in his discretion the official receiver may think fit. The official receiver may also, as in his discretion he may think fit, pay or direct the trustee to pay any costs or charges properly incurred, prior to the appointment of the trustee, for any separate estate out of the joint estate or out of any other separate estate, and any part of the costs or charges of the joint estate incurred prior to the appointment of the trustee which affects any separate estate out of that separate estate.

(2) Where the joint estate of any co-debtors is insufficient to defray any costs or charges properly incurred after the appointment of the trustee, the trustee, with such consent as is hereinafter mentioned, may pay such costs or charges out of the separate estates of such co-debtors, or one or more of them. The trustee, with the said consent, may also pay any costs or charges properly incurred for any separate estate, after his appointment, out of the joint estate, and any part of the costs or charges of the joint estate, incurred after his appointment, which affects any separate estate, out of that separate estate. No payment under this rule shall be made out of a separate estate or joint estate by a trustee without the consent of the committee of inspection of the estate out of which the payment is intended to be made, or, if such committee withhold or refuse their consent, without an order of the court.

**Apportionment of trustee's remuneration.**—270. Where joint and separate estates are being administered, the remuneration of the trustee in respect of the administration of the joint estate may be fixed by the creditors or (if duly authorized) by the committee of inspection of such joint estate, and the remuneration of the trustee in respect of the administration of any separate estate may be fixed by the creditors or (if duly authorized) by the committee of inspection of such separate estate.

**Keeping distinct accounts.**—Where, under a separate adjudication, the trustee possesses himself of the assets of the firm, he must keep similar distinct accounts, so as not to pay the separate creditors of the bankrupt out of the assets of the firm, nor the creditors of the firm out of the separate property of the bankrupt. (*g*)

(*g*) See *Ex parte* Voguel, 1 Atk. 132, as to the old practice. See, too, *Cooke's Bank. Law*, 267, ed. 8, and the cases of *Ex parte* Tate, *Ex parte* Hayward, *Ex parte* Burnaby, there cited. See, too, *Watson on Part. 324*, and 1 *Mont. Part. note 2 D. p. 110*, in notes; *Dutton*

*v. Morrison*, 17 Ves. 209; *Re Wait*, 1 J. & W. 610. Again, when persons are connected in various partnerships, and a joint adjudication is obtained against them all, an order may be obtained for keeping separate accounts of the different firms as well as the separate estates

[\*695] **\*Correcting mistakes, etc.**—If a creditor proves his demand against the wrong estate he will, on discovering his mistake, be allowed to transfer his proof to the other estate. (*h*)

Where one estate has paid debts or expenses which ought to have been borne by the other, the amount so paid will be ordered to be refunded by the latter to the former estate. (*i*)

**Consolidation of estates.**—If the joint and separate creditors both agree that the joint and separate estates shall be consolidated and administered as one fund, there is no reason why such consolidation should not take place. And where the two estates are so blended that they cannot be kept separate they must be consolidated, whether all the creditors desire it or not; but if it is practicable to keep them separate they will not be consolidated except by consent. (*k*) If a majority of a meeting of both classes of creditors are in favor of a consolidation, it will, nevertheless, not be made until after it has been ascertained by the court to be for the general benefit. (*l*) It is, however, to be observed that a consolidation of estates does not affect debts proved before the consolidation takes place; and if a debt has been properly proved against each of several estates, the creditor will not be prejudiced by their subsequent consolidation. (*m*)

of each partner. *Ex parte* Marlin, 2 Bro. C. C. 15. But if there are several connected firms, one of which alone is made bankrupt, there can only be the common order for keeping separate accounts of the joint and separate estates of the partners composing it. *Ex parte* Parker, Cooke's Bank. Law, 272, ed. 8.

(*h*) *Ex parte* Vining, 1 Deac. 555.

(*i*) *Ex parte* Rutherford, 1 Rose, 201; *Ex parte* Reid, 2 id. 84. And see *Rogers v. Mackenzie*, 4 Ves. 752,

as to contribution between estates.

(*k*) *Ex parte* Sheppard, Mon. & Bl. 415.

(*l*) See *Ex parte* Strutt, 1 Gl. & J. 29; *Ex parte* Part, 2 Deac. & C. 1, where an inquiry was directed. In *Ex parte* Smith, 2 M. & A. 60, it was held unnecessary to serve the assignees before making a consolidating order, the consolidation having been found to be beneficial.

(*m*) *Ex parte* Fuller, 1 M. & A.

222.

**Comparison of the modes in which lawyers and accountants proceed in cases of bankruptcy.**—The principle adopted in bankruptcy of making each estate pay its own creditors often produces results strangely at \*variance with the doctrine of equality, and with an [\*696] accountant's notions of right and wrong. This cannot be better shown than by the following extract from a work already referred to on the subject of partnership accounts:

“ We will suppose A., a man worth 40,000*l.* clear, well known in London, and of extensive credit, to embark with an inventor, B., to carry into effect some invention which requires apparently more credit than actual capital; there being what may fairly be considered a most excellent prospect of success, and of turning the concern, as the phrase is, within a short space of time, *i. e.*, receiving from the anticipated profits of the concern, within the number of months in which the bills given by this partnership become due, sufficient money to meet them or take them up. Some accident intervenes, by which it becomes necessary for A., who undertakes to find money, to raise a sum to meet the numerous bills which the firm has ventured to put afloat in expectation of their being taken up by the success of the project. A. raises upon his credit from several persons, perhaps at a distance in the country, and altogether ignorant of his trading, what he himself considers only temporary loans, to the amount of 39,000*l.*, and brings this money into the firm, not as a loan, but as capital. We will further suppose that this is insufficient, and that the firm, after a few more struggles, stops payment for 50,000*l.* owing to different individuals. A general meeting of all the creditors is called, at which there is a desire to settle the matter and realize the effects as fast as possible, and for that purpose they put the matter into the hands of an accountant. If the accountant knew anything of the law of bankruptcy he would see the difficulties; but if he simply followed out the mercantile principles he would first take the accounts of the firm and there find 50,000*l.* debt, and we will say 4,000*l.* assets, and consequently a balance due to the firm from A. and B. to the amount of 46,000*l.*, of which A. would be indebted 23,000*l.* and B. 23,000*l.*, or in some other proportions as the case may be; but, as B. is worth nothing at all, A. would be answerable for the whole. The accountant would then take A.'s accounts where he finds A.'s estate worth 40,000*l.*, and that he is liable to the firm for 46,000*l.* and to other people for 39,000*l.*, making the whole amount of his liabilities 85,000*l.*, upon which he would declare a dividend of 9*s.* 4½*d.* He would therefore carry over to the firm as a creditor for 46,000*l.* the sum of 21,647*l.* 1*s.* 3*d.*, and to the private creditors 18,352*l.* 18*s.* 9*d.*, which, distributed among

the 39,000*l.*, would give them a dividend of 9*s.* 4½*d.* He would then proceed to distribute the effects of the firm, amounting to 21,647*l.* 1*s.* 3*d.*, recovered from A., and the assets in hand, viz., 4,000*l.*, and this, being altogether 25,647*l.* 1*s.* 3*d.* distributed among 50,000*l.*, would give a dividend of 10*s.* 3*d.* Such would be the result of the accountant's operation. But some of the separate creditors would probably be dissatisfied with this result and strike a docket and have the accounts taken in bankruptcy. The court of bankruptcy would immediately overthrow the accountant's labors and take the accounts upon an entirely different plan. It would direct that the separate estate should be distributed amongst the separate creditors, and, if there were any surplus, [\*697] that it should be paid over to the \*joint estate. Therefore, as 40,000*l.* would be distributed among 39,000*l.*, they would be all paid in full, and 1,000*l.* passed over to the joint estate, making the assets of the joint estate 5,000*l.*, which, being distributed among the 50,000*l.*, would be exactly 2*s.* in the pound. Thus the court of bankruptcy would give the separate creditor 20*s.* in the pound, and the joint creditors 2*s.*; while, according to the mercantile principle, the separate creditors ought to have had but 9*s.* 4½*d.*, and the joint creditors 10*s.* 3*d.* Such is the difference between the practice of the two classes. But if the firm had had no property at all, or the partners, in a fit of despair, had pledged all the assets for more than they were worth, the court of bankruptcy would have adopted the accountant's principle, and suffered the joint creditors to go in for their dividends upon the separate estate." (n)

## 2. *Of joint estate and separate estates.*

**Joint and separate estates.**—What property is distributable as partnership property, and what is not, depends mainly upon two questions, viz.:

1. Whether, as between the partners themselves, the property in question belonged to them jointly, or to some or one of them to the exclusion of the others; and

2. Whether the property in question, no matter to whom it belonged, was, at the time of the bankruptcy, in the reputed ownership of the firm, or in that of some or one only of its members.

The principles applicable to these questions having been already fully examined, (o) it is only necessary in the pres-

(n) Cory on Merc. Accounts, p. 124 *et seq.* (2d ed.). (o) *Ante*, book iii, ch. 4, and book iv, ch. 2, § 3, and *ante*, § 3.

ent place to notice those peculiar difficulties which are met with when it becomes necessary to distinguish joint from separate estate for the purposes of administration in bankruptcy.

It was decided in the celebrated case of *Ex parte Ruffin* (*p*) that agreements between partners altering the character of partnership property are binding on the trustee in bankruptcy, if made *bona fide* and before the commission of any act of bankruptcy. This case has been followed by many others, and it is therefore now beyond dispute that if a partnership is dissolved, and a *bona fide* agreement is come to between the partners to the effect that what was the partnership property shall become the property of him who continues the business, \*and afterwards [\*698] the firm or the continuing partner becomes bankrupt, that which was the partnership property cannot be distributed as the joint estate of the firm, but must be treated as the separate estate of the continuing partner. (*q*) The creditors of the firm have no lien on its property which can prevent the partners from *bona fide* changing its character, and converting it into the separate estate of one of them. (*r*)

Even if the liabilities of the partnership exceed its assets at the time when the agreement is made, still, if the partners act *bona fide*, and not with a view to defraud their creditors, the ownership in that which before the agreement was partnership property will have changed, and the joint creditors of the firm cannot insist on its distribution as joint estate. (*s*)

(*p*) 6 Ves. 119.

(*q*) *Re Simpson*, 9 Ch. 572; *Ex parte Walker*, 4 De G. F. & J. 509; *Ex parte Titner*, 1 Atk. 136; *Ex parte Fell*, 10 Ves. 347; *Ex parte Williams*, 11 id. 6; *Ex parte Clarkson*, 4 D. & Ch. 56; *Ex parte Gurney*, 2 M. D. & D. 541; *Bolton v. Puller*, 1 Bos. & P. 539.

(*r*) *Ex parte Ruffin*, 6 Ves. 119;

*Ex parte Williams*, 11 id. 6; *Stuart v. Ferguson, Hayes (Ir. Ex.)*, 472. Compare the cases cited *infra*, note (*u*).

(*s*) *Ex parte Walker*, 4 De G. F. & J. 509; *Ex parte Peake*, 1 Madd. 346; *Ex parte Clarkson*, 4 D. & C. 66, *per Sir G. Rose*. And see *Ex*

**Observations on agreements converting joint into separate estate, and vice versa — Fraud.**— In order, however, that property of the firm may have lost its character of joint estate by agreement between its partners, the agreement must not be tainted with fraud, nor be still executory, nor leave the property subject to the liens of the partners for their own indemnity. If there be fraud, whether as between the partners themselves, or solely as against creditors, the agreement will not be binding on the trustee in bankruptcy; (*t*) and where both partners were insolvent, an assignment by one of them of his share to the other in consideration of a covenant by him to pay the partnership debts was held fraudulent and void as against the joint creditors. (*u*)

**Executory agreements.**— Moreover, if the agreement to transfer or assign is still executory, the character of the property will not, in fact, have been changed at the [\*699] time of the bankruptcy, and it must, therefore, be distributed as if the agreement had not been entered into. (*x*) Whether an agreement is executory or not must depend upon its terms; the test, however, is to see whether there was, at the time of the bankruptcy, any act still to be done before the ownership could be considered by the partners as changed; if in any case there was such an act to be done, the trustee will not be bound by the agreement, whilst if there was not he will. In *Ex parte Wheeler*, (*y*) a partner retired; the continuing partner was to take the partnership property, and to pay the retiring partner an annuity, and the father of the continuing partner was to

*parte* Carpenter, Mont. & MacAr. 1. Compare *Re Kemptner*, 8 Eq. 287, where the state of the firm was held to disprove *bona fides*.

(*t*) See *Ex parte Rowlandson*, 2 V. & B. 172, and 1 Rose, 416, and *Anderson v. Maltby*, 2 Ves. Jr. 244.

(*u*) *Ex parte Mayou*, 4 De G. J. & Sm. 664; *Re Kemptner*, 8 Eq.

287. Compare the cases in the last note but one.

(*x*) *Ex parte Wheeler*, Buck, 25; *Ex parte Cooper*, 1 M. D. & D. 358. And see *Ex parte Clarkson*, 4 D. & Ch. 64, 67, and *Re Kemptner*, 8 Eq. 286.

(*y*) Buck, 25. See, also, *Ex parte Wood*, 10 Ch. D. 554.

become surety for payment of this annuity. The father, however, who was not a party to the agreement, declined to become surety, and on the bankruptcy of the continuing partner it was held that the agreement was not an executed agreement, and that the property of the firm had not therefore, by the agreement, become the property of the bankrupt. On the other hand, in *Ex parte Clarkson*, (2) where a partner retired upon the terms of receiving a certain sum of money, partly in cash and partly in bills, and the cash was paid and the bills were given, it was held that the ownership in the partnership property had passed, although the bills were subsequently dishonored. (a)

**Property must not be still subject to the liens of the other partners.**—Again, even if it has been agreed between partners that on a dissolution the continuing or surviving partner shall be entitled to the assets of the firm, still, so long as these assets continue subject to the right of the other partners to have them applied in discharge of the joint debts, the assets will continue joint for the purpose of distribution in the event of bankruptcy. To convert them into separate estate the agreement between the partners must be inconsistent with the continuance of this lien. (b)

**\*Evidence of such agreements.**—The mere fact [\*700] that a partnership has been dissolved, or that a partner has retired, will not be sufficient evidence of an agreement for the conversion of the joint estate of the firm into the separate estate of the continuing partner. It may be

(2) 4 D. & Ch. 56; S. C. *nomine Ex parte Gibson*, 2 M. & Ayr. 4. See *Ex parte Wood*, 10 Ch. D. 554, which was a similar case; but as no cash was paid, and the security was not given, the property continued joint.

(a) Compare, also, *Ex parte Cooper*, 1 M. D. & D. 358, and *Ex parte Gurney*, 2 id. 541; *Re Kemptner*, 8 Eq. 286.

(b) See *Ex parte Dear*, 1 Ch. D. 514; *Ex parte Morley*, 8 Ch. 1026; *Ex parte Manchester Bank*, 12 Ch. D. 917, and 13 id. 465, *sub nom. Ex parte Butcher*, where the joint assets were not converted. Compare *Re Simpson*, 9 Ch. 572, where they were. See, also, the cases in note (c), *infra*.

that the property has been intrusted to him simply for the purpose of winding up the affairs of the concern; and unless there be some agreement by virtue of which it has become his exclusively, it will in case of bankruptcy be distributable as joint estate. (c)

**Effect of doctrine of reputed ownership.**—But, as before observed, whether property is as between the partners themselves the joint property of them all, or the separate property of some of them only, the nature of that property may for the purposes of distribution be altogether changed by reason of the doctrine of reputed ownership. To avoid this some change in the possession of the property should, if necessary, be made consistently with the agreement between the partners. (d) Under ordinary circumstances if one partner owns all the property used for partnership purposes, and his copartners have nothing more than an interest in the partnership business, still that property, if personal, will on the bankruptcy of the firm be distributable as the joint estate of all, and not as the separate estate of its true owner. (e)

**Effect of holding out.**—Moreover, if A. allows B. to carry on business with his, A.'s, goods, and on his, A.'s, behalf, although not in his name, but credit is given to them both on the supposition that they are partners, the property with which the business is carried on will be treated as the joint estate of the two, and not as the separate estate of A. (f)

(c) *Ex parte Leaf*, 4 Deac. 287; *McCulloch*, 20 Eq. 397. These and other cases have been already adverted to. See section 3 of this chapter.  
(e) See *Ex parte Hayman*, 8 Ch. D. 11; *Ex parte Hunter*, 2 Rose, 382; *Ex parte Owen*, 4 De G. & S. 351. Compare *Ex parte Murton*, 1 M. D. & D. 252.

(d) See, as to goods in the possession of third parties, *Ex parte Harris*, 1 Madd. 583; as to debts, *Ex parte Sprague*, 4 De G. M. & G. 866; as to goods in the possession of the bankrupt himself, *Graham v. Shaw*, 1 Ch. 421; *Ex parte Hayman*, 8 Ch. D. 11.



\*Where property is distributable as joint estate [\*701] the joint creditors take it as the promiscuous joint property of all the partners, without reference to the respective interests of the partners therein. (*g*)

### 3. *Of joint, separate, and joint and separate debts.*

**Of joint, separate, and joint and separate debts.**—For the purpose of administering the estates of bankrupt partners their creditors must be divided into three classes, viz.:

1. The joint creditors of the firm, (*h*) to whom all the partners are jointly liable. (*i*)

2. The separate creditors of each partner, to whom the partners are only liable severally and *respectively*.

3. Joint *and* separate creditors, to whom the partners are not only liable jointly, but also separately for the same debt. (*k*)

What is a debt of the firm and what is not must be determined by the principles discussed in the first two chapters of the second book. (*l*) Without repeating those principles

(*g*) *Ex parte* Hunter, 2 Rose, 382.

(*h*) A curious misnomer. Joint creditors, properly speaking, are persons jointly entitled, and not, as here, persons who have nothing to do with each other, but happen to have the same joint debtors.

(*i*) The word *separate* is relative. Creditors may be *separate* relatively to one person, and *joint* relatively to another; *e. g.*, suppose a partnership of five; creditors of any four are *separate* relatively to the creditors of the five, but are *joint* relatively to the respective creditors of each of the four. See Bank. Rules, 1886, r. 269, *ante*, p. 693.

(*k*) A creditor who has obtained a judgment against several persons jointly can levy execution against any one or more of them; and

therefore, in one sense, judgment debtors may be said to be jointly and severally liable. This, however, does not render their creditor a joint and separate creditor. He is a joint creditor; for his judgment is joint, and the remedies open to him do not alter the character of the right to enforce which they are given. See *Ex parte* Christie, Mont. & Bli. 352. No distinction is made between persons to whom all the partners are jointly indebted in connection with their partnership business, and other persons to whom they are also all jointly indebted. See *Hoare v. Oriental Bank Corp.* 2 App. Ca. 589.

(*l*) The wife of a partner who has lent money to the firm is a joint creditor of the firm, and ranks as

it may be useful to recapitulate shortly the leading [\*702] rules deducible from them, and bearing upon the proof of debts in bankruptcy.

**First, as to the original nature of a debt.**—As a general rule, that which is the debt of the firm is not the separate debt of any of its members who have not made themselves severally liable for it; (*m*) but

**Frauds and breaches of trust.**—Breaches of trust, and frauds imputable to a firm, place the *cestuis que trustent* and defrauded creditors in the position of joint and several creditors; (*n*) and

**Debts.**—A debt of a firm of two partners, of whom one is dormant, may, at the option of the creditor, be treated as the joint debt of the firm, or as the separate debt of the ostensible partner; (*o*) and a debt of a firm of two partners, one of whom is merely nominal, may likewise, at the option of the creditor, be treated as the joint debt of the two, or as the separate debt of him who is in substance the whole firm. (*p*)

**Bills.**—Bills accepted in the name of a trading firm give a right of proof against the joint estate to a *bona fide* holder

such. *Ex parte* Nottingham, 19 Q. B. D. 88.

(*m*) See *ante*, p. 192 *et seq.*; *Ex parte* Dobinson, 2 Deac. 341; *Ex parte* Carlisle Canal Co. id. 349; *Ex parte* Appleby, id. 482; *Ex parte* Benson, 2 M. D. & D. 750; and as to bills and notes, *Ex parte* Flintoff, 3 M. D. & D. 726; *Ex parte* Wilson, id. 57; *Re* Clarke, De Gex, 153; *Ex parte* Buckley, 14 M. & W. 469, and 1 Ph. 562, reversing *Ex parte* Christie, 3 M. D. & D. 736.

(*n*) See *ante*, p. 193 *et seq.* As to breaches of trust, see *Ex parte* Poulson, De Gex, 79; *Ex parte* Barnewall, 6 De G. M. & G. 801. Compare *Ex parte* White, 6 Ch. 397, where the moneys were held

not to be trust moneys; and *Ex parte* Geaves, 8 De G. M. & G. 291, where, although there was a clear breach of trust by one partner, the others were not liable for it. See, as to the trustee, *Ex parte* Burton, 3 M. D. & D. 364. As to frauds, see *Ex parte* Adamson, 8 Ch. D. 807; *Ex parte* Unity, etc. Banking Association, 3 De G. & J. 63.

(*o*) *Ex parte* Hodgkinson, 19 Ves. 294; *Ex parte* Norfolk, id. 458; *Ex parte* Law, 3 Deac. 541.

(*p*) See *Ex parte* Arbouin, De Gex, 359. See, also, *Scarf v. Jardine*, 7 App. Ca. 345, *ante*, pp. 197, 198.

for value without notice of the fact that they have been accepted or indorsed without authority; (q) but not to a drawer affected with such notice; (r) and if a separate creditor of one partner takes in payment a bill of the firm, he must, in order to entitle \*himself to prove [\*703] against its joint estate, show that the bill was given with the sanction of the other partners. (s)

Bills accepted in the name of one partner only do not give their holder a right to prove against the joint estate of the firm. (t)

**Money of which firm has had the benefit.**—A separate creditor does not acquire a right to prove against the joint estate simply because that estate has had the benefit of the money he seeks to recover; nor does the joint creditor acquire a right to prove against the separate estate of one partner because he alone has had such benefit. (u)

**Secondly, as to the conversion of a joint into a separate debt, and vice versa.**—A joint creditor who releases one of his debtors cannot prove against the estates of any of the others; (x) and the doctrine of merger, by taking a higher security, or obtaining a judgment (before bankruptcy), (y) applies in bankruptcy as well as at law, and

(q) *Ex parte* Bushell, 3 M. D. & D. 615, and *ante*, p. 180 *et seq.*

(r) *Ex parte* Holdsworth, 1 M. D. & D. 475. As to indorsees with notice availing themselves of the ignorance of their indorser, see *Rooth v. Quin*, 7 Price, 193.

(s) *Ex parte* Thorpe, 3 M. & A. 716; *Ex parte* Austen, 1 M. D. & D. 247; *Ex parte* Agace, 2 Cox, 312; *Ex parte* Bonbonus, 8 Ves. 540; *Ex parte* Goulding and Davies, 2 Gl. & J. 118.

(t) *Ex parte* Bolitho, Buck, 100. But where the name of the firm and of the acceptor are the same, see *Ex parte* Law, 3 Deac. 541.

(u) *Ex parte* Wheatley, Cooke's

Bank. Law, 534, ed. 8; *Ex parte* Peele, 6 Ves. 602; *Ex parte* Har-  
top, 12 id. 349; *Ex parte* Hunter, 1  
Atk. 223; *Ex parte* Emly, 1 Rcse,  
65; *Re* Ferrar, 9 Ir. Ch. 11.

(x) *Ex parte* Slater, 6 Ves. 146.  
So a creditor may, by dealing with  
his debtor, discharge that debtor's  
surety, and on the bankruptcy of  
the surety be precluded from prov-  
ing against his estate. See *Ex parte*  
Webster, De Gex, 414, where the  
surety was a firm which had ac-  
cepted bills sought to be proved  
against its joint estate.

(y) *Ex parte* Christie, Mon. & B.  
352.

has a most important influence on a creditor's right to prove against the joint estate of a firm or the separate estates of its members. (z)

**Merger.**—A separate bond given to secure a joint debt creates a separate debt (a) and destroys the joint debt. (aa)

A judgment has the same effect; (b) and a joint [\*704] judgment against several \*for a debt owing by them jointly and severally makes the debt joint only; (c) but a separate judgment for a joint and separate debt does not make it separate only. (d)

Notwithstanding the effect of a judgment in merging the debt in respect of which it has been recovered, it was held in *Ex parte Waterfall* (e) that where a firm consisted of one partner in this country, and of other partners abroad, and a creditor of the firm sued the partner here and recovered judgment against him, the debt of the firm was not so extinguished as to preclude the creditor from proving against its joint estate on the subsequent bankruptcy of the judgment debtor.

**Falling back on original debt after taking a security for it.**—Where a creditor obtains an additional security for a pre-existing debt, and that security is not of such a nat-

(z) See *ante*, book ii, ch. 2, § 3.

(a) *Ex parte Flintoff*, 3 M. D. & D. 726.

(aa) *Ex parte Hernaman*, 12 Jur. 643.

(b) *Kendall v. Hamilton*, 4 App. Ca. 504. See *ante*. p. 193, and the Addenda; *Ex parte Higgins*, 3 De G. & J. 33. As to when the court can go behind the judgment and look to its consideration, see the cases in *Re Tollemache*, viz.: *Ex parte Revell*, 13 Q. B. D. 720; *Ex parte Edwards*, 14 id. 415; *Ex parte Anderson*, id. 606. See, also, *Ex parte Lennox*, 16 id. 315; *Ex parte Banner*, 17 Ch. D. 480; *Ex parte Kibble*, 10 Ch. 373.

(c) *Ex parte Christie*, Mon. & Bl.

352. But this does not apply to breaches of trust in respect of which there is a joint and several liability. See *Re Davison*, 13 Q. B. D. 50.

(d) *Drake v. Mitchell*, 3 East, 251; *Re Clarkes*, 2 Jo. & Lat. 212; *Ex parte Bate*, 3 Deac. 358. See above note in *Kendall v. Hamilton*, p. 193.

(e) 4 De G. & S. 199, and 15 Jur. 214, *sub nom. Ex parte Jones*. See, too, *Ex parte Dunlop*, Buck, 253, and *Ex parte Stanborough*, 5 Madd. 89, as to actions against several partners, some of whom were outlawed. See above note in *Kendall v. Hamilton*, p. 193.

ure as to merge the debt, he may, if the security becomes unavailable, fall back on the original debt. This is constantly done by the creditors of bankrupt partners; and the cases show that a creditor who takes a joint bill for a separate debt, (*f*) or a separate bill for a joint debt, (*g*) becomes, as he intended, a joint and several creditor, and does not lose his right of having recourse, in case of need, to his original debt, unless he has taken the fresh security in substitution for his original demand. (*h*) If, however, he has done this, he cannot fall back on his first debt.

Thus, in *Ex parte Whitmore*, (*i*) upon the formation of a \*partnership between two persons, one of [\*705] them wrote to his bankers, to whom he was indebted, and directed them to transfer any balance due from him to the debit of the new firm; this was done, and the bankers drew on the firm for the amount of the balance; the bills were accepted by the new firm, but were not paid. The firm afterwards became bankrupt, and it was held that the bankers, having exchanged debtors, could not be considered as the separate creditors of their old customer, and could only rank as joint creditors of the firm.

Unless, however, there has been a substitution of debtors, or unless a creditor has by reason of the doctrine of merger become deprived of his right to revert to his original debt, the acquisition of a fresh security will not destroy the rights which he may have independently of that security.

(*f*) *Ex parte Seddon*, 2 Cox, 49; *Ex parte Lobb*, 7 Ves. 592; *Ex parte Meinertzhagen*, 3 Deac. 101; *Ex parte Hay*, 15 Ves. 4; *Ex parte Kedie*, 2 D. & Ch. 321. See above note in *Kendall v. Hamilton*, p. 193.

(*g*) *Keay v. Fenwick*, 1 C. P. D. 745; *Bottomley v. Nuttall*, 5 C. B. N. S. 122; *Ex parte Hodgkinson*, 19 Ves. 291. See, too, *Ex parte Raleigh*, 3 M. & A. 670; *Ex parte Fairlie*, Mont. 17. See above note in *Kendall v. Hamilton*, p. 193.

(*h*) In *Byles on Bills*, ed. 10, p. 381, it is said: "The taking of his separate bill from one of several partners for a joint debt will, as we have seen (*i. e.*, on p. 48), discharge the others." But this is going too far. See the last note, and *ante*, p. 247, where the cases referred to by Mr. Justice Byles are noticed. See above note in *Kendall v. Hamilton*, p. 193.

(*i*) 3 Deac. 365. See, too, *Ex parte Kirby*, Buck, 511, and *Ex parte Jackson*, 2 M. D. & D. 146.

**Substitution of debtors can only be made with the creditor's consent.**—With respect to the right of a joint creditor to prove against a separate estate, or of a separate creditor to prove against a joint estate on the ground that there has been a substitution of debtors, or that a new right has been acquired, it is to be remembered that there can be no such substitution or acquisition save by the creditor's consent. Consequently, if a partnership is dissolved, and by agreement between the partners one of them is to continue the business and pay all the debts, the creditors of the firm do not become the separate creditors of the continuing partner unless they accede to the arrangement so entered into between him and his copartners. (*k*) Upon precisely similar grounds a creditor of one person does not become the joint creditor of him and another who enters into partnership with him, merely because the two partners have agreed between themselves that the debts of each shall be the debts of both. Unless the creditor accedes to that arrangement he is not bound by it, nor can he avail himself of it; his position in fact is unaltered — he does not lose his old right, nor does he gain any new one. (*l*)

(*k*) *Ante*, p. 239 *et seq.*; *Ex parte* Freeman, Buck, 471; *Ex parte* Fry, 1 Gl. & J. 96; *Ex parte* Gurney, 2 M. D. & D. 541; *Ex parte* Appleby, 2 Deac. 482.

(*l*) *Ante*, p. 205 *et seq.*; *Ex parte* Jackson, 1 Ves. Jr. 130; *Ex parte* Peele, 6 id. 601; *Ex parte* Williams, Buck, 13; *Re* Littles, 10 Ir. Eq. 275; *Ex parte* Parker, 2 M. D. & D. 511; *Ex parte* Graham, id. 781; *Ex parte* Hitchcock, 3 Deac. 507. As to what is a sufficient accession, see *Rolfe v. Flower*, L. R. 1 P. C. 27; *Bilborough v. Holmes*, 5 Ch. D. 255; *Scarf v. Jardine*, 7 App. Ca. 345, noticed *ante*, pp. 197, 198. Mr. Cooke, indeed, lays it down that if new partners come into a firm, and it is agreed that

the stock and debts of the old firm shall become those of the new firm, and the latter becomes bankrupt, the creditors of the old firm may prove against the joint estate of the new firm; and he cites *Ex parte* Bingham and *Ex parte* Clowes, 2 Bro. C. C. 595 (Cooke's Bank. Law, 534, ed. 8). The facts of the first of these two cases are not stated. *Ex parte* Clowes was a very peculiar case, and if it was ever an authority for the doctrine that a separate debt can, as between the partners and the creditor, become a joint debt, or *vice versa*, without the privity of the creditor, the case must be considered as no longer law. See 1 Mont. Part. note 2 F. p. 117, in notes.

**\*Easier for separate creditor to become a joint [\*706] creditor than vice versa.**—It is easier for a separate creditor to establish a right to prove against the joint estate than for a joint creditor to establish a right to prove against a separate estate; for, whilst all that is necessary in the first case is to show that those who were not originally debtors have become so, (*m*) it is necessary in the last case to show that a person already a debtor with others has taken his and their debt upon himself alone. The difficulty here adverted to does not arise from any legal doctrine, but from the circumstance that what such a debtor may do is *prima facie* referable to his character of joint debtor, and does not therefore establish what is wanted, viz., his separate liability. For this reason it has been frequently held that a joint creditor of two or more persons does not become the separate creditor of one of them by entering into arrangements with him for the payment of the debt by him; (*n*) and that in the case of a dissolution of partnership a creditor of the firm, who merely treats the continuing partner as his debtor, does not acquire a right to prove against his separate estate. (*o*) To entitle himself so to prove the creditor must show either that the continuing partner has become separately liable for the \*debt [\*707] for which he was already liable jointly with his former partners, (*p*) or that there is no joint estate. (*q*)

Perhaps Mr. Cooke rested the right of proof on the absence of joint estate, as in *Ex parte Taylor*, 2 M. D. & D. 753.

(*m*) A written agreement is not necessary to establish this. *Ex parte Lane*, De Gex, 300.

(*n*) *Ex parte Raleigh*, 3 M. & A. 670; *Ex parte Fairlie*, Mont. 17; *Ex parte Smith*, 1 M. D. & D. 165.

(*o*) *Ex parte Appleby*, 2 Deac. 482; *Ex parte Gurney*, 2 M. D. &

D. 541; *Ex parte Fry*, 1 Gl. & J. 96; *Ex parte Freeman*, Buck, 471.

(*p*) See *Bilborough v. Holmes*, 5 Ch. D. 255, and the cases in the last two notes. And compare *Ex parte Bradbury*, Mon. & Ch. 625, where a joint creditor had acquired a right to prove against a separate estate.

(*q*) See *Ex parte Taylor*, 2 M. D. & D. 753. This matter will be alluded to hereafter.

#### 4. *Of the proof and payment of partners' debts generally.*

There is nothing peculiar in the mode of proving debts by or against partners, nor is there any difference between the claims which are provable by or against them and claims which are provable by and against other persons. For information on these subjects the reader is therefore referred to treatises on the law of bankruptcy.

Companies which are incorporated can prove their debts by a duly authorized officer, and a firm can prove by any of its members. (*r*)

**Bankrupt trustee ought to prove against his own estate.**—If a bankrupt is a trustee, and is himself indebted to the estate vested in him, he ought himself to prove against himself on behalf of those whose trustee he is. (*s*) It is important to bear this in mind in those cases in which an executor has carried on his testator's trade with assets which ought not to have been employed therein, and has subsequently become bankrupt.

**Debts provable.**—With respect to debts provable against bankrupts, several important alterations in the law have been made with a view to include all possible claims arising out of contract, so as to discharge the bankrupt therefrom. The present law is contained in the following enactment of the Bankruptcy Act, 1883:

**Description of debts provable in bankruptcy.**—§ 37. (1) Demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise or breach of trust (*t*) shall not be provable in bankruptcy.

[\*708] \*(2) A person having notice of any act of bankruptcy available against the debtor shall not prove under the order for any debt or liability contracted by the debtor subsequently to the date of his so having notice.

(*r*) 46 and 47 Vict. ch. 52, § 148.

(*s*) See *Ex parte* Richardson, Buck, 202, and 3 Madd. 138; *Ex parte* Shaw, 1 Gl. & Jam. 127.

(*t*) Before the act, demands arising from breaches of trust were

provable, and were treated as arising out of contract rather than out of tort. *Emma Silver Mining Co. v. Grant*, 17 Ch. D. 122; *Randall v. Edwards*, 31 Ch. D. 100.



(3) Save as aforesaid, all debts and liabilities, present or future, certain or contingent, to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order, shall be deemed to be debts provable in bankruptcy. (*u*)

(4) An estimate shall be made by the trustee of the value of any debt or liability provable as aforesaid, which, by reason of its being subject to any contingency or contingencies, or for any other reason, does not bear a certain value.

(5) Any person aggrieved by any estimate made by the trustee as aforesaid may appeal to the court.

(6) If, in the opinion of the court, the value of the debt or liability is incapable of being fairly estimated, the court may make an order to that effect, and thereupon the debt or liability shall, for the purposes of this act, be deemed to be a debt not provable in bankruptcy. (*x*)

(7) If, in the opinion of the court, the value of the debt or liability is capable of being fairly estimated, the court may direct the value to be assessed before the court itself, without the intervention of a jury, and may give all necessary directions for this purpose, and the amount of the value when assessed shall be deemed to be a debt provable in bankruptcy.

(8) "Liability" shall, for the purposes of this act, include any compensation for work or labor done, any obligation or possibility of an obligation to pay money or money's worth on the breach of any express or implied covenant, contract, agreement or undertaking, whether the breach does or does not occur, or is or is not likely to occur or capable of occurring before the discharge of the debtor, and generally it shall include any express or implied engagement, agreement or undertaking to pay, or capable of resulting in the payment of, money or money's worth, whether the payment is, as respects amount, fixed or unliquidated; as respects time, present or future, certain or dependent on any one contingency, or on two or more contingencies; as to mode of valuation, capable of being ascertained by fixed rules, or as a matter of opinion. (*y*)

Moreover, by schedule 2, it is declared that as to future debts:

**Future debts.**—21. A creditor may prove for a debt not payable

(*u*) As to future calls, see *Re Mercantile Mutual Marine Ins. Ass.* 25 Ch. D. 415. As to covenants to assign after-acquired property, *Coll- yer v. Isaacs*, 19 Ch. D. 342.

(*x*) Where no order is made the debt is treated as provable. *Morgan v. Hardy*, 18 Q. B. D. 646.

(*y*) See, as to actions for torts, *Ex parte Brooke*, 3 Ch. D. 494, where a verdict was obtained before adjudication; and as to claims to indemnity, *Kellock v. Enthoven*, L. R. 9 Q. B. 241, and 8 id. 458.

when the debtor committed an act of bankruptcy as if it were payable presently, and may receive dividends equally with the other [\*709] creditors, deducting only thereout \*a rebate of interest at the rate of 5*l.* per centum per annum, computed from the declaration of a dividend to the time when the debt would have become payable, according to the terms on which it was contracted.

Further, it is enacted by section 10 as follows:

**Power of court to stay proceedings.**—§ 10. (2) The court may, at any time after the presentation of a bankruptcy petition, stay any action, execution or other legal process against the property or person of the debtor, and any court in which proceedings are pending against a debtor may, on proof that a bankruptcy petition has been presented by or against the debtor, either stay the proceeding or allow them to continue on such terms as it may think just.

**Assets distributable *pari passu*.**—With certain exceptions (z) the assets in the hands of the trustee are distributable *pari passu* amongst all the unsecured creditors for value of the bankrupt, without regard to the question whether they are creditors by specialty or by simple contract. (a)

**Secured creditors.**—The position of secured creditors is peculiar and requires special notice.

What creditors have securities for the debts due to them and what have not, and the nature of the securities, if any, to which they are entitled, are matters beyond the scope of the present work. (b) But the rights of the drawers, acceptors and indorsees of bills of exchange, which are secured by legal or equitable charges upon goods or other property, have so often to be considered in the event of the bankruptcy of commercial firms that a few observations on such rights may not be out of place.

(z) The exceptions are enumerated in 46 and 47 Vict. ch. 52, §§ 40, 41 and 42; they relate to rates, taxes, wages, apprenticeship fees and rent. See, as to savings banks, *Re Williams*, 36 Ch. D. 573.

(a) As to voluntary bonds. see *Ex parte Berry*, 19 Ves. 218; *Ex parte Hookins*, 3 De G. & S. 549.

(b) Execution creditors are secured by the seizure of the sheriff. *Ex parte Jones*, 10 Ch. 663; *Ex parte Jameson*, 3 Ch. D. 488; *Edwards v. Scarsbrook*, 3 B. & Sm. 280. See, as to them, *ante*, p. 674 *et seq.*

**Secured bills.**—Nothing is more common than for the owner of goods to pledge them in some form or other to some person, who, having them as his security, will accept a bill of exchange drawn upon him by their owner. The drawer then discounts the bill and thus obtains cash.

As between the drawer and the acceptor the question constantly arises as to the extent of the security; *e. g.*, whether the goods have been pledged for particular bills only, or to cover all the bills of the drawer, or to cover whatever may be due from the drawer to the acceptor, so that the proceeds are to be dealt with generally on account, the goods not being specifically appropriated to anything in particular. The rights of the drawer and acceptor obviously depend on the answers to be given to these questions, which are questions of fact, very often turning on correspondence and the course of dealing between the parties, and sometimes very difficult to determine. (*c*)

**Right of drawer.**—But, without solving these questions, it is to be observed that the right of the drawer is to redeem the goods on paying the amount due upon them; or, if they have been sold, to have an account of their proceeds, and to have them applied in paying such amount, and to have the surplus paid back to him, subject to such lien or set-off, if any, as the acceptor may have against them on some other account.

**Right of acceptor.**—The acceptor, on the other hand, is entitled to hold the goods as a security and indemnity against his liability on the bill. If he pays the bill out of his own moneys, he becomes the creditor of the drawer for the amount, and can sue him for it unless it is part of the agreement between them that before having recourse to the drawer personally the acceptor shall realize the goods and so reduce the liability of the drawer. In the absence, however, of some agreement to this effect, it seems that the

(*c*) See, for example, *Ex parte • Re Gothenburg Commercial Co.* 29 Dever, 13 Q. B. D. 766, and 14 *id.* W. R. 358, there referred to. 611; *Re Broad*, 13 Q. B. D. 740, and

drawer has no more right than any other mortgagor to have the security given by him realized before he is himself called upon for payment. (*d*) The object of giving the security is to keep the acceptor out of cash advances, but not to prevent him from making advances on the credit of the drawer if the acceptor thinks proper to do so.

**Effect of bankruptcy.**—In the event of the bankruptcy of the drawer his trustee is \*entitled to no greater rights than the drawer would be if solvent, unless indeed the goods can be claimed by the trustee under the reputed-ownership clause.

**Of drawer.**—On the other hand, the acceptor has the same rights as before, (*e*) with this qualification, that his right of action against the drawer is converted into a right of proving against his estate, and that if the right of proof is exercised the security must be given up. (*f*)

**Of acceptor.**—In the event of the bankruptcy of the acceptor his trustee can hold the goods subject to the right of the drawer to redeem them, or to have them applied in taking up the bills drawn against them. (*g*) If the goods are sold by the trustee and they realize less than the amount of the bills, the trustee is entitled to the difference from the drawer; whilst, if they realize more, the trustee must hand the difference to him, subject to any lien or set-off to which the proceeds may be subject on some other account. If the goods are sold before the bankruptcy, the proceeds, unless specifically appropriated to the bills, become a mere debt due to the drawer, for which he can only prove against the acceptor's estate. (*h*)

(*d*) So long as the acceptor is solvent the drawer does not seem to be entitled to have the goods realized and applied in taking up the bills. His right seems to be to redeem the goods. See *Ex parte Dever* (No. 2), 14 Q. B. D. 611.

(*e*) See *Ex parte Flower*, 2 Mon. & A. 224, where the drawer's assignees received proceeds of the

goods, and the acceptor was held entitled to have the money applied in taking up the bills. See, also, *Ex parte Imbert*, 1 De G. & J. 152.

(*f*) See *infra*, as to this.

(*g*) See *Ex parte Dever*, 13 Q. B. D. 766, and *Ex parte Dever* (No. 2), 14 id. 611.

(*h*) *Ex parte Dever*, 13 Q. B. D. 766, and S. C. (No. 2), 14 id. 611.

**Right of holder.**—If the bill has been negotiated by the drawer further complications arise. It is now clearly settled (*i*) that the indorsement of the bill by the drawer, without more, does not confer upon the holder the benefit of the security given by the drawer to the acceptor, (*k*) even although the bill refers to the goods and to a letter of advice accompanying it. (*l*) But the benefit \*of the security, *i. e.*, the right to have the goods [\*712] sold and applied in taking up the bill, may be transferred to the indorsee of the bill, and when such is the case he will be entitled to have the goods so applied. (*m*) Unless, however, the holder is the transferee of the security as distinguished from the bill, his remedy is on the bill itself, *viz.*, first against the acceptor, and secondly against the drawer. This, moreover, is the case not only when both drawer and acceptor are solvent, but also in the case of the bankruptcy of either of them. (*n*)

But if both are bankrupt the case is different; for the court having then to administer both the estate of the drawer and the estate of the acceptor will apply the goods pledged in taking up the bills which were drawn against them. This is the celebrated rule in *Ex parte Waring*, (*o*)

(*i*) Notwithstanding *Frith v. Forbes*, unless it be on the grounds suggested in 29 Ch. D. 870–872.

(*m*) As in *Inman v. Clare*, Johns. 769; *Re Agra and Masterman's Bank*, 2 Ch. 391.

(*n*) See the cases in the last four notes, and *Ex parte General South American Co.* 10 Ch. 635; *Vaughan v. Halliday*, 9 Ch. 561.

(*l*) *Robey & Co.'s Perseverance Iron Works v. Ollier*, 7 Ch. 695; *Ex parte Dever*, 13 Ch. D. 766; *Phelps, Stokes & Co. v. Comber*, 29 id. 813, and *Brown, Shipley & Co. v. Kough*, id. 848. These cases cannot be reconciled with *Frith v.*

(*o*) 19 Ves. 345. The principle of the rule was much discussed in *Royal Bank of Scotland v. Commercial Bank of Scotland*, 7 App. Ca. 366, and is clearly explained in *City Bank v. Luckie*, 5 Ch. 773. See, generally, *Eddis on Ex parte Waring*.

which is of such great importance in administering the estates of commercial firms.

The rule in *Ex parte Waring* is that, if both the drawer and the acceptor of a bill of exchange become bankrupt, the holder of the bill is entitled to have any securities held by the acceptor for it applied in taking it up. The rule is based upon the following considerations: The property held by the acceptor for the bill cannot be applied in payment of his general creditors, because it is held by him for a particular purpose, and on trust to relieve the drawer from his obligation to pay the bill on which the acceptor is primarily liable, but which, being bankrupt, he cannot pay. On the other hand, the property cannot be applied in payment of the general creditors of the drawer because it is pledged to the acceptor, and the drawer is not entitled to have the property back except on redeeming it, or, in other words, himself paying the bill. The court, therefore, applies the property in such a way as to give effect as far as possible to the respective rights of both

drawer and acceptor under the circumstances of [\*713] their being both \*bankrupt, or, as the phrase is, according to the equities between the two estates.

The result is that the securities are applied as both parties intended that they should be, viz., in taking up the bill in respect of which they were given. (*p*) Moreover this rule has been extended to cases where the estates of the drawer and the acceptor are both insolvent, and are under judicial administration although not in bankruptcy. (*q*)

**Application of rule.**—Such being the principle of the rule, it is obvious that whether the security is given to cover one bill or several is immaterial, except that if given for several the rule will benefit the holders of all of them; (*r*)

(*p*) See the judgment of Cotton, Bank, 4 Ch. 423; Bank of Ireland L. J., in *Ex parte Dever* (No. 2), 14 Q. B. D. 623. v. Perry, L. R. 7 Ex. 14; Hickie & Co.'s Case, 4 Eq. 226.

(*q*) *Powles v. Hargreaves*, 3 De G. M. & G. 430; *Ex parte Alliance* B. D. 611, where the security was

further the rule applies whether the value of the sureties is less than the amount of the bills drawn against them or not, (*s*) and whether the holders of the bills knew that they were secured or not. (*t*) Nor is it necessary that the remitter of the bill should have indorsed it. (*u*) But the right is subject to the prior rights of the joint creditors, if any, of the drawer and acceptor to have the securities treated as joint assets. (*x*) The principle of these decisions applies where the drawer and acceptor are companies in liquidation; at all events if they are also insolvent; but, it has been said, not otherwise. (*y*) But the rule is based on the equities between the drawer and the acceptor, and has been held not to apply if the acceptor has a general lien on all securities of the drawer in his hands for the general balance of his account; (*z*) nor where the bill-holder has already received by way of dividend more than the value of the securities; (*a*) nor where circumstances have occurred which have rendered the securities no longer applicable to take up the bill. (*b*) The \*circumstance, however, that the [\*714] security was given to cover other liabilities besides the bill in question is not material if in the events which have happened there is no other liability to be covered by it. (*c*)

**Proof of secured debts.**—Passing now to the position of secured creditors in the event of the bankruptcy of their debtor, the rule is that a creditor whose debt is secured is not allowed to retain his security and also to prove in competition with the other creditors. Such a creditor cannot

given for some bills only, and the holders of them got paid in full.

(*s*) *Id.*; *Powles v. Hargreaves*, 3 De G. M. & G. 430.

(*t*) *Ex parte Perfect*, Mont. 25.

(*u*) *Ex parte Smart*, 8 Ch. 220.

(*x*) *Ex parte Dewhurst*, 8 Ch. 965.

(*y*) *Hickie & Co.'s Case*, 4 Eq.

226. *Sed qu.* See the cases in note (*q*).

(*z*) *Id.* *Sed qu.* See *Ex parte Dever* (No. 2), 14 Q. B. D. 611.

(*a*) *Loder's Case*, 6 Eq. 491.

(*b*) As in *Ex parte Alliance Bank*, 4 Ch. 423.

(*c*) *City Bank v. Luckie*, 5 Ch.

773. But see, *contra*, *Levi & Co.'s Case*, 7 Eq. 449.

prove his debt or any part of it without giving the other creditors the benefit of his security. (*d*) This, however, he can do in one of two ways, viz., either realize his security, or give credit for its value, and prove for the balance then remaining due to him; or give up his security altogether and prove for his whole debt. (*e*) The trustee may redeem the security at its assessed value; or he may have the security sold. (*f*) The valuation and proof by the creditor may be amended by leave of the court; (*g*) and, if the security is sold after being valued, the amount realized is to be treated as its value, and dividends are to be calculated on the balance and to be rectified accordingly if necessary. (*h*)

**Secured creditor not compellable to give up his security.**—If the creditor's security is sufficient to pay what is due to him there is no necessity for him to apply to the court at all; but if it is insufficient he commonly applies to the court to have his security realized under its direction, to have the proceeds applied in discharge of his debt, and to have liberty to prove for the difference. (*i*) The [\*715] \*trustee, however, has no power to compel a secured creditor to take this course; nor can the trustee deprive him of his security without paying in full what may be due to him upon it. (*k*)

(*d*) 46 and 47 Vict. ch. 52, § 39, and Sched. 2, rr. 9 to 17. If he proves for the whole debt he loses the benefit of his security. *Couldery v. Bartrum*, 19 Ch. D. 394; *Ex parte Solomon*, 1 Gl. & Jam. 25; *Grugeon v. Gerrard*, 4 Y. & C. Ex. 119.

(*e*) 46 and 47 Vict. ch. 51, § 39, and Sched. 2, rr. 9 to 17. See *Ex parte Prescott*, 4 D. & Ch. 23, in which the rule was applied to joint debts and joint securities.

(*f*) 46 and 47 Vict. ch. 52, Sched. 2, r. 12.

(*g*) Id. rr. 13 and 14.

(*h*) Id. r. 15. See under the former act, *Société Gén. de Paris v. Green*, 8 App. Ca. 606, and *Couldery v. Bartrum*, 19 Ch. D. 394.

(*i*) Bonds, bills of exchange and other personal securities in the hands of a creditor are treated like real sureties. *Ex parte Hellier*, *Cooke's Bank*, 146, ed. 8. But not bills discounted by a banker and held pending discount. *Ex parte Schofield*, 12 Ch. D. 337.

(*k*) *Ex parte Jackson*, 5 Ves. 357; *Ex parte Topham*, 1 Madd. 38. And see *Davis' Case*, 12 Eq. 516.



**Observations on equitable securities.**— Moreover, it must be borne in mind that an equitable mortgage may be created by deposit of deeds (*l*) without any written memorandum; and, if originally made for a particular debt, may be extended by parol to some other debt; (*m*) and that a creditor who has a security not exclusively appropriated to a particular debt may, on the bankruptcy of his debtor, appropriate that security to any debt which may be owing to him by the bankrupt. (*n*) Moreover, a security may be more extensive as against one person than as against another, *e. g.*, more extensive as against a principal debtor than as against his surety. (*o*)

**Cases in which a secured creditor can prove and also retain his security.**— The rule which precludes a secured creditor from retaining his security and also proving for his debt applies only where the debt is payable out of the estate to which the security belongs; or, in other words, only where the same estate is debtor to the amount due on the security, and creditor by the value of the same security. (*p*) Consequently, a creditor of a bankrupt firm of two partners, holding a security given by a larger firm of which the bankrupts are members, is not affected by the rule in question; he may prove for the whole amount of the debt against the estate of the bankrupt firm, and yet retain the security given by the larger and solvent firm. (*q*) So,

(*l*) As to the necessity for which, see *Ex parte Broderick*, 18 Q. B. D. 766.

(*m*) See *Ex parte Barnett*, De Gex, 194; *Ex parte Ford*, 3 M. D. & D. 457; *Ex parte Moss*, 13 Jur. 866.

(*n*) See *Ex parte Johnson*, 3 De G. M. & G. 218; *Ex parte Hunter*, 6 Ves. 94. Compare *Ex parte McKenna*, 7 Jur. N. S. 588, which turned on the terms of the deposit. See, further, on this subject, the cases referred to *ante*, p. 654 *et seq.*

(*o*) *Ex parte Walker*, 3 Deac. 672.

(*p*) *Ex parte West Riding Union Banking Co.* 19 Ch. D. 105, where half the security belonged to the bankrupt and half to his late partners. The question whether this is the case or not is sometimes one of considerable difficulty, as in the case just cited and in *Ex parte Brett*, 6 Ch. 833, but the principle is clear.

(*q*) *Ex parte Parr*, 1 Rose, 76; *Ex parte Bloxham*, 6 Ves. 449; *Ex parte Goodman*, 3 Madd. 373; *Ex*

if one partner mortgages his own property for [\*716] \*the debt of the firm, the creditor is allowed, on the bankruptcy of the firm, to prove for his whole debt against the joint estate, and yet retain the mortgage security given by the one partner. (*r*)

If a partner gives as a security for a debt of the firm shares standing in his own name, the right of the creditor to prove for his whole debt and retain his security depends upon whether as between the partners themselves the shares are assets of the firm, or the separate property of the partners in whose name they stand; if they are assets of the firm they must be so treated, even although the creditor was not aware of the fact when he took them as security. (*s*)

Again, if A. and B. are partners, and A. gives a separate security for a partnership debt and dies, and B. becomes bankrupt, the creditor can prove against B.'s estate without giving up his security. (*t*) So, where a creditor of a firm has a security belonging to the firm, and also a separate covenant for payment by each partner, such creditor may, on the bankruptcy of the firm, retain his security and prove against the separate estates of the covenantors. (*u*) Again, where a firm has assigned its property in trust for its creditors, whose rights against the separate estates of the partners are expressly reserved, a creditor who is both a joint and a separate creditor may claim the benefit of the assign-

*parte* Sammon, 1 D. & C. 564. See, too, *Ex parte* English and American Bank, 4 Ch. 49; and *Ex parte* Wilson, 2 Jur. 67, where a creditor of two firms engaged in a joint transaction proved against one and retained his security against the other.

(*r*) *Ex parte* Caldicott, 25 Ch. D. 716; *Ex parte* Peacock, 2 Gl. & J. 27; *Ex parte* Adams, 3 M. & Ayr. 157; *Ex parte* Groom, 2 Deac. 265. See, also, the next note, and *Ex*

*parte* Manchester and Liverpool District Banking Co. 18 Eq. 249, a case of a composition.

(*s*) *Ex parte* Manchester and County Bank, 3 Ch. D. 481; *Ex parte* Connell, 3 Deac. 201.

(*t*) *Ex parte* Bowden, 1 D. & C. 135; *Ex parte* Smyth, 3 Deac. 597.

(*u*) *Re* Plummer, 1 Ph. 56, settling the doubts raised in *Ex parte* Shepherd, 1 M. D. & D. 101, and *Ex parte* Davenport, id. 313.

ment and yet prove as a separate creditor against one of the firm if he becomes bankrupt. (x) Where, however, one partner only is bankrupt, and a joint creditor is secured by a mortgage of the bankrupt's separate estate, that creditor cannot prove as a separate \*creditor with- [\*717] out giving up his security; (y) and if the mortgage is a mere equitable mortgage, giving the creditor no *locus standi* as a separate creditor and nothing more than a lien, he will not be a separate creditor of the bankrupt, or be allowed to prove against his separate estate at all. (z)

**Position of *cestuis que trustent*.**—The rule which enables a joint creditor, having a separate security, to prove as a creditor, and yet to retain his security, applies to persons who claim, not as creditors merely, but also as *cestuis que trustent*. Consequently, if A., B. and C. are bankers, having trust moneys in their hands, and A. afterwards improperly invests some of it on a mortgage, the *cestuis que trustent* may, on the bankruptcy of the firm, claim the benefit of the mortgage, and prove against the joint estate of the firm for the whole amount due from it in respect of the trust moneys. (a)

A curious and instructive case on the right of a creditor to prove without giving up his security arose in *Ex parte Turney*. (b) There A. and B., father and son, were partners; A. equitably mortgaged an estate of his own to secure a debt due from B. A. afterwards died, and the estate descended to B. subject to the mortgage in question. At A.'s death, however, the joint debts of A. and B. were more than sufficient to exhaust A.'s assets. B. having become

(x) *Ex parte Thornton*, 5 Jur. N. S. 212. See, too, *Ex parte Geaves*, 8 De G. M. & G. 291. to be sold to enable the creditor to vote in the choice of a trustee, etc. Id.

(y) *Ex parte West Riding Union Banking Co.* 19 Ch. D. 105. (a) See *Ex parte Biddulph*, 3 De G. & S. 587, and *Ex parte Burton*, 3 M. D. & D. 364.

(z) *Ex parte Leicestershire Banking Co.*, De Gex, 292; *Ex parte Lloyd*, 3 M. & A. 601. The courts will, however, order the security (b) 3 M. D. & D. 576. See, also, *Ex parte Brett*, 6 Ch. 839.

bankrupt shortly after his father's death, it was held that, notwithstanding the descent of the mortgaged estate to B., the mortgage creditor was at liberty to prove against B. without giving up the security, although it was admitted that this could not have been allowed if the descended estate had been of any value to B.

**Marshaling.**—This right of the secured creditor may avail not only himself, but the owner of the security he holds; and by the equitable doctrine of marshaling, [\*718] a joint creditor of a firm \*may be entitled to prove against the separate estate of one of its members, or *vice versa*, contrary to the general rule.

For example, in *Ex parte Salting* (c) a firm wrongfully pledged the goods of a customer to their bankers for an advance to the firm. One of the partners gave to the bankers a separate guaranty for the advance. On the bankruptcy of the firm the bankers sold the goods and applied the proceeds in reducing their debt. They then proved for the residue against the separate estate of the partner who had given the guaranty. His separate estate was more than sufficient to pay the whole debt; and it was held that the owner of the goods was entitled to have the banker's securities marshaled, and to have the benefit of the guaranty to the extent of the value of the goods which had been sold, and to prove for that value against the separate estate of the partner who had given the guaranty.

**Rule that a creditor must prove and not sue the debtor.**—The same principle of equality amongst creditors which prevents one creditor from holding a security, and proving for what is due on it, is also the foundation of the rule that no creditor is allowed to sue a bankrupt in respect of any demand which may be proved as a debt under the bankruptcy. (d) But where the creditor is the creditor not only of the bankrupt, but also of another person, the cred-

(c) 25 Ch. D. 148. See, also, *Ex* § 10 (2), *ante*, p. 709. Under the *parte* Alston, 4 Ch. 168. old law the creditor could sue or

(d) 46 and 47 Vict. ch. 52, § 9 and prove at his election.

itor may prove against the estate of the former, and yet sue the latter, and get from him what he can. (*e*) Consequently if a creditor of a firm, one of the members of which is alone bankrupt, is in a position to prove against his estate, such creditor may prove against it, and, at the same time, sue the solvent partners, (*f*) and it is not now necessary to join the bankrupt as a co-defendant. (*g*)

**\*Two proofs for same debt not allowed.**—An. [\*719] other fundamental principle relating to the proof of debts, and one which requires notice here, is that there can be only one proof against the same estate in respect of the same debt. Thus, in the common case of principal and surety, if the principal is bankrupt, and the creditor proves against his estate, and receives a dividend, and has recourse to the surety for the difference, the surety cannot prove against the bankrupt's estate without giving credit for the dividend already paid to the principal creditor; in other words, the dividend paid in respect of both proofs will be no greater than that payable in respect of one proof for the whole amount of the debt due by the bankrupt. (*h*) This rule is of considerable importance in mercantile transactions, and is closely allied to the rule which, as will be seen hereafter, precludes a creditor from proving the same debt against both the joint and the separate estates of a bankrupt firm. The rule forbidding two proofs in respect of the same debt applies in the winding up of companies. (*i*)

Again, if a person is adjudicated bankrupt here and

(*e*) See *Ex parte* Schofield, 12 Ch. D. 337; *Ex parte* Isaac, 6 Ch. 58. pare Blannin v. Taylor, Gow, N. P. 199.

See, as to cases of suretyship, *Ex parte* Coplestone, Mon. & Ch. 262. (*g*) 46 and 47 Vict. ch. 52, § 114. See, previously, *Ex parte* Isaac, 6

(*f*) *Ex parte* Isaac, 6 Ch. 58; Keay Ch. 58; *Ex parte* Stanton, 1 M. D. & D. 273.

*v. Fenwick*, 1 C. P. D. 745; Bottomley v. Nuttall, 5 C. B. N. S. 122; Heath v. Hall, 4 Taunt. 326; 463; *Ex parte* European Bank, 7 Bovill v. Wood, 2 M. & S. 22; Ch. 99; Robson, Bank. 231 *et seq.*, Harley v. Greenwood, 5 B. & A. 95; ed. 3.

*Ex parte* Read, 1 Rose, 460. Com- (*i*) *Ex parte* European Bank, 7 Ch. 99, reversing S. C. 12 Eq. 501.

abroad, a creditor who has proved abroad cannot prove here without giving credit for what he has received under his proof abroad. (*k*)

**Interest.**—As regards interest, the Bankruptcy Act, 1883, schedule 2, rule 20, enacts as follows:

20. On any debt or sum certain, payable at a certain time or otherwise, whereon interest is not reserved or agreed for, and which is overdue at the date of the receiving order and provable in bankruptcy, the creditor may prove for interest at a rate not exceeding four per centum per annum to the date of the order from the time when the debt or sum was payable, if the debt or sum is payable by virtue of a written instrument at a certain time, and if payable otherwise, then from the time when a demand in writing has been made giving the debtor notice that interest will be claimed from the date of the demand until the time of payment. (*l*)

A jury may allow interest where it is payable by agreement or by mercantile usage; also (by 3 and 4 Wm. [\*720] 4, ch. 42) where a \*sum certain is payable under a written instrument at a certain time, and where payment of a sum certain, not so payable, has been demanded by notice in writing stating that interest will be claimed. (*m*)

Interest at four per cent. is payable on all proved debts from the date of the receiving order if the estate is more than sufficient to pay all proved demands upon it. (*n*)

Having adverted to the proof and payment of debts generally, it is proposed to pass to the subject of the proof and payment of the debts of partners, first, out of their joint, and next, out of their respective separate assets.

(*k*) *Ex parte Wilson*, 7 Ch. 490; (*m*) See 3 Chitty's Statutes, 584, Banko de Portugal v. Waddell, 5 ed. 4.  
App. Ca. 161; Selkrig v. Davies, 2 (*n*) See 46 and 47 Vict. ch. 52, Dow, 230. § 40 (5). See, as to appropriating securities to interest, *Re Savin*, 7

(*l*) See *Ex parte Bath*, 27 Ch. D. 509; *Ex parte Bishop*, 15 Ch. D. 421. Ch. 760.

A. *Proof against the joint estate.*

**Administration of partner's joint estate.**—The administration of the joint estate will be best explained by examining:

1. The rights of the joint creditors,
  2. The rights of the partners,
  3. The rights of their separate creditors,
- as against that estate.

*First, with respect to the joint creditors.*

**1. Position of the joint creditors.**—The joint creditors have the first claim for payment out of the joint estate; (*o*) and until they have been paid all the principal money due to them, with interest thereon (*p*) up to the date of the receiving order (*q*) (if their debts carry interest), no other person is entitled to receive a farthing out of the assets of the firm. (*r*) If a person is truly a creditor of the firm he is not deprived of his right to rank as a joint creditor merely \*because he may have some 'separate [\*721] security for his debt; (*s*) for he is treated in such a case as a joint creditor having the advantage of a collateral security. (*t*) But it must not be forgotten that a person who advances money to one partner on his separate security, and makes him alone the debtor, has no *locus standi* against the firm merely because the money is afterwards applied to its use. (*u*)

(*o*) *Ante*, p. 692. As to marshalling, see *ante*, p. 717.

(*p*) *Ex parte* Ogle, Mont. 350; *Pearce v. Slocombe*, 3 Y. & C. Ex. 84; *Ex parte* Reeve, 9 Ves. 590. And see *Ex parte* Woodford, 3 De G. & S. 666.

(*q*) Interest after that date is not payable in priority to the separate creditors. *Ex parte* Findlay, 17 Ch. D. 334.

(*r*) The expenses of getting in joint estate must of course be paid

out of it. *Ex parte* Rutherford, 1 Rose, 201.

(*s*) See *Ex parte* Brown, cited 1 Atk. 225; *Ex parte* Clowes, 2 Bro. C. C. 595; *Ex parte* Harman, 2 Gl. & J. 25.

(*t*) See *Ex parte* Hunter, 1 Atk. 227; *Ex parte* Harman, 2 Gl. & J. 25, and *ante*, p. 715.

(*u*) *Ex parte* Hunter, 1 Atk. 223; *Ex parte* Emly, 1 Rose, 65; *Lloyd v. Freshfield*, 9 D. & Ry. 19. And see *ante*, pp. 189 *et seq.* and 703.

*Secondly, with respect to the partners.*

**2. Position of the partners.**— Subject to the exceptions which will be hereafter stated, it is an established rule that a partner in a bankrupt firm shall not prove in competition with the creditors of the firm. They are, in fact, his own creditors, and he cannot be permitted to diminish the partnership assets to the prejudice of those who are not only creditors of the firm, but also of himself. (x) If, therefore, a partner is a creditor of the firm, neither he nor his separate creditors (for they are in no better position than himself) can compete with the joint creditors as against the joint estate. Lord Hardwicke, it is true, in *Ex parte Hunter*, (y) allowed this to be done; but that case has not, in this respect, been followed, and has long been considered as overruled. (z)

In *Ex parte Sillitoe*, (a) a leading case on this subject, two partners in a banking firm carried on a separate business as ironmongers, and became creditors of the bank to a large amount, in consequence of having, with a view to enable the bank the better to obtain money, discounted [\*722] their securities. \*The banking firm was adjudged bankrupt, and an attempt was made on behalf of the ironmongery firm to prove, as joint creditors, against the joint estate of the bank. Lord Eldon, overruling the decision of the vice-chancellor, rejected the proof upon the ground which is stated above.

So in the previous case of *Ex parte Hargreaves*, (b) *alias*

(x) See *Ex parte Sillitoe*, 1 Gl. & J. 382; *Ex parte Hargreaves*, 1 Cox, 441; *Ex parte Reeve*, 9 Ves. 590; *Ex parte Rawson*, Jac. 279. See *Ex parte Gliddon*, 13 Q. B. D. 43, noticed hereafter, where two firms were curiously intermixed.

(y) *Cooke's Bank. Law*, 526, ed. 8, and 1 Atk. 223.

(z) *Ex parte Burrell*; *Ex parte Parker*; *Ex parte Pine*, all cited in

*Cooke's Bank. Law*, 528, ed. 8. And see *per* Ld. Eldon, *Ex parte Harris*, 1 Rose, 438.

(a) 1 Gl. & J. 382. *Ex parte Williams*, 3 M. D. & D. 433, was a similar case. See, also, *Ex parte Maude*, 2 Ch. 550, and *infra*, p. 727.

(b) 1 Cox, 440, and 1 Gl. & J. 382, and 11 Ves. 414, *infra*, p. 726.



*Shakeshaft, Stirrup and Salisbury*, three persons were partners as cotton manufacturers, and two of them were also partners as linen-drappers; goods, manufactured by the three, were consigned to the two for sale for the benefit of the larger firm, and bills were drawn on the two on behalf of the three; both firms became bankrupt, and the larger firm was indebted to the smaller in respect of the above transactions. It was held that the members of the smaller firm being liable to the debts of the larger firm, the assignees of the former could not compete with the joint creditors of the latter.

**Executors of a deceased partner.**—Again, as the estate of a deceased partner is liable to the debts of the firm, (c) it follows that, so long as such liability exists, his executors cannot prove against the joint estate of the surviving partners for the amount due from them to his estate. (d) But if those debts are paid, or the estate of the deceased is relieved from them, (e) such proof is admissible; (f) except in respect of assets properly brought into or left in the business by the executors as part of the capital of the deceased. No proof, however, in respect of such assets is admissible against the joint estate of the surviving partners unless all their joint debts contracted as well before as after the death of the deceased are paid. The leading case on this subject is *Ex parte Butterfield*. (g) In that case a

(c) *Ante*. pp. 194, 595.

(d) *Ex parte* Blythe, 16 Ch. D. 620; *Nanson v. Gordon*, 1 App. Ca. 195, affirming *Ex parte* Gordon, 10 Ch. 160.

(e) *Ex parte* Andrews, 25 Ch. D. 505, shows that the outstanding joint liabilities need not be paid. It is enough if there is no proof in respect of any of them. But note there was in that case no reason to suppose they ever would be proved. See, also, above, p. 738, note (g).

(f) *Ex parte* Edmonds, 4 De G. F. & J. 488, noticed *infra*, p. 723.

(g) *De Gex*, 570. *Ex parte* Corbridge, 4 Ch. D. 246, was decided on the same principle. See, too, *Ex parte* Garland, 10 Ves. 110, where proof in respect of assets improperly employed was admitted, and proof in respect of assets properly employed was rejected. See, also, *Scott v. Izon*, 34 Beav. 434; *Ex parte* Thompson, 2 M. D. & D. 761, and compare the cases in the next note.

[\*723] sole trader \*directed by his will that it should be lawful for his widow to employ 6,000*l.* in continuing his business, and he appointed her and his son executors. After the testator's death his widow and son continued his business with his assets and became bankrupt. The persons beneficially interested in the assets which had been employed by the bankrupts sought to prove in respect thereof against their joint estate; but it was held that, to the extent of 6,000*l.*, no such proof could be allowed, for the employment of 6,000*l.* being authorized by the will, the proof could not be admitted, without, in substance, infringing the rule which precludes a partner from competing with his own creditors.

This case may be usefully compared with *Ex parte Edmonds*. (*h*) There partnership articles provided in effect that, if one of the partners died, so much of his share in the capital as should not exceed 100,000*l.* should be continued in and be considered as part of the partnership effects; that the survivors should pay off the amount of the deceased's share by instalments, with interest, but that his estate should not share in the profits accruing after his death. The partner in question having died, more than 150,000*l.* was found due to him from the partnership. His executors took a bond for this amount from the surviving partners, who afterwards became bankrupt, having, however, previously paid all the debts for which they and the deceased were jointly liable. (*i*) It was held that the executors were entitled to prove against the joint estate of the surviving partners for the whole amount of the bond, and not only for the excess over 100,000*l.*, as the other joint creditors contended. The provisions of the deed taken together showed plainly that the 100,000*l.* was intended to be con-

(*h*) 4 De G. F. & J. 480. See, also, *Ex parte Hill*, 3 M. & A. 175, and *Ex parte Crofts*, 2 Deac. 102, where trust money lent to partners was held to be provable as a joint debt. (*i*) The payment of the debts to which the estate of the deceased was liable distinguishes this from *Ex parte Gordon*, 10 Ch. 160.

tinued in the concern in the sense of a loan bearing interest; and that although the money was to be employed in \*the business of the partnership, it was to be so em- [\*724] ployed, not as the money of the deceased, but as the money of the surviving partners, borrowed by them from his estate.

**Assets improperly brought into the business.**— Assets of a deceased partner brought into the business by his executor in breach of trust do not form part of the joint estate of the surviving partners, and may be the subject of proof against that estate, not only in competition with those creditors who have become such since the death of the deceased, but also in competition with those whose debts accrued in his life-time; (*k*) as regards the last the proof is exceptional, but is allowed for the same reason as similar proof is allowed where separate estate of a partner has been fraudulently dealt with as property of the firm. (*l*)

**Two firms with common partner.**— Another instructive case, illustrating the rule now under consideration, is afforded by *Ex parte Brown*. (*m*) There, in substance, there were two firms with a common partner, viz., A. and B., and A. and C.; C. had made himself separately liable for a debt owing by A. and B.; both firms became bankrupt. The principal creditor proved against C.'s separate estate and received a dividend. A claim was then made on behalf of C.'s separate estate to prove for the amount thus paid out of it against the joint estate of A. and B. But it was held that this proof could not be allowed, for, the principal creditor not having been paid in full, he had a right of proof against the joint estate of A. and B., and that, consequently, C. could not diminish that estate to his prejudice.

(*k*) *Ex parte Garland*, 10 Ves. 110; *is* conceived, be the subject of *Ex parte Westcott*, 9 Ch. 626. See proof, unless the debts of the firm ante, ch. 3, § 2. contracted in his life are paid.

(*l*) See *infra*. Assets of the tes- (*m*) 2 M. D. & D. 718. See, too, tator in the business when he died, *Ex parte Rawson*, Jac. 274, and improperly left in it, cannot, it

**Exceptions to rule that partner cannot compete with his own creditors.**—There are, however, three exceptions to the rule above stated, viz.:

1. Where the separate property of one partner has been fraudulently dealt with as the property of the firm.

2. Where there are two distinct trades carried on by the firm, and by one or more of the members of it, with distinct capitals.

[\*725] \*3. Where a partner has obtained his order of discharge, or has been otherwise discharged from the joint debts, and has afterwards become a creditor of the firm. (*n*)

This last exception rests on the principle that the discharged partner is no longer a debtor to the creditors of the firm, and does not, therefore, fall within the rule which precludes a person from competing with his own creditors. The two first exceptions are not so easily explained.

**Exception in the case of fraud.**—If separate property of one partner has been fraudulently converted by his co-partners to the use of the firm, such property must be treated as the separate estate of the defrauded partner; and proof on his behalf (or rather on behalf of his separate estate) is therefore allowed in respect of such property against the joint estate and in competition with the joint creditors. (*o*) Upon precisely the same principle, if a partner has fraudulently converted property of the firm to his own use, proof on behalf of the joint estate is allowed in respect of such property against his separate estate and in competition with his separate creditors. (*p*) This, however, is a subject which will have to be considered hereafter.

(*n*) *Ex parte* Smith, 14 Q. B. D. 394, where the estate of the deceased partner was discharged by the statute of limitations; *Ex parte* Atkins, Buck, 479, where a partner who had obtained his certificate took up bills of the firm.

(*o*) See *per* Lord Eldon in *Ex parte* Sillitoe, 1 Gl. & J. 382. and in *Ex parte* Harris, 1 Rose, 437.

(*p*) *Ex parte* Lodge and Fendal, 1 Ves. Jr. 166, *infra*, p. 735.

**Exception in the case of distinct trades.**—If one of two firms, carrying on distinct trades, becomes creditor of the other in the ordinary way of their trade, the creditor firm may prove against the joint estate of the debtor firm in competition with its other joint creditors, although one or more persons may be partners in both firms. (*q*)

If neither firm contains the other, *e. g.*, if one firm is A. and B., and the other firm is A. and C., either may rank as a joint \*creditor of the other, because the [\*726] creditors of the one are not the creditors of the other. (*r*)

**Case where one firm contains the other.**—If one of the firms contains the other, *e. g.*, if one firm is A., B. and C., and the other is A. and B., or A. only, two cases have to be considered, according as the larger or the smaller firm is the debtor to the other; for whilst all persons who are creditors of the larger firm are creditors of the smaller, the converse is evidently not true. Consequently, although the larger firm does not compete with its own creditors if it proves against the joint estate of the smaller firm, the smaller firm must necessarily compete with its own creditors if it is allowed to rank as a joint creditor against the estate of the larger firm. Hence, although it was long ago decided that proof might be made by the larger firm against the smaller, (*s*) it was also decided that proof could not be made by the smaller against the larger. (*t*) However, it seems now settled that if the two trades are distinct, and if the larger firm has become indebted to the smaller in the regular way of their trades, (*u*) the smaller firm may prove,

(*q*) See, in addition to the cases cited below, *Ex parte* Ring, *Ex parte* Freeman, *Ex parte* Johns, cited in Cooke's Bank. Law, 534, ed. 8. Compare *Ex parte* Gliddon, 13 Q. B. D. 43, where no debt was contracted.

(*r*) *Ex parte* Thompson, 3 Deac. & Ch. 612.

(*s*) *Ex parte* St. Barbe, 11 Ves. 413; *Ex parte* Castell, 2 Gl. & J. 124; *Ex parte* Hesham, 1 Rose, 146.

(*t*) *Ex parte* Hargreaves, 1 Cox, 440; *Ex parte* Adams, 1 Rose, 305; *Ex parte* Sillitoe, 1 Gl. & Jam. 382.

(*u*) This is essential. See *infra*.

like any other joint creditor, against the joint estate of the larger. This was decided in *Ex parte Cook*, (x) where one partner who carried on a separate business was allowed to rank as a joint creditor against the joint estate of the firm of which he was a member, and which had become indebted to him in the ordinary way of their and his respective trades.

**The trades must be distinct and the debts have been contracted in the ordinary course of them.**—The exception now under discussion is, however, only allowed provided two things concur, viz.: first, there must be two distinct trades; and secondly, the debt sought to be proved must have arisen from dealings between trade and trade in the ordinary way of business. It was because the two firms were, in fact, one, the smaller one being only a branch of the larger, and carrying on *its* business, that proof was disallowed in *Ex parte Hargreaves*, (y) and it was [\*727] because, although the two \*firms and their trades were distinct, the debt sought to be proved had not arisen in the ordinary way of trade, that proof was disallowed in *Ex parte Sillitoe* (z) and in *Ex parte Williams*. (a) In this last case there was a firm of iron-masters; two of the firm were also bankers; the iron firm was indebted to the banking firm for advances, but proof in respect of them on behalf of the banking firm against the joint estate of the iron firm was disallowed, inasmuch as the circumstances under which the debt was contracted precluded the idea that the bankers had made the advances in the ordinary way of their business as bankers.

Even in these excepted cases, however, proof by one partner is not allowed unless on taking the partnership accounts a balance still remains due to him. (b)

**Case where partnership has not commenced.**—The rule which precludes one partner from proving against the

(x) Mont. 228.

(a) 3 M. D. & D. 433. See, also,

(y) 1 Cox, 440. See *ante*, p. 722. *Ex parte Maude*, 2 Ch. 550.

(z) 1 Gl. & J. 382. See *ante*, p. (b) *Ex parte Maude*, 2 Ch. 550.

estates of his copartners does not apply to persons who have not become partners, and who have not rendered themselves liable to third parties as if they were partners. This is well illustrated by *Ex parte Turquand*. (c) There, in substance, A. agreed to become a partner with B. and C., who were already in partnership together, and who carried on business in the names of B. and C. It was agreed that A. should bring in 2,000*l.*, and that the name of the firm should be altered to B., C. & Co. A. advanced 2,000*l.* to B. and C.; the name of the firm was altered as arranged, but no articles of partnership were ever signed, and A. refused to sign any or to do anything more before he was satisfied as to B. and C.'s solvency. There was no evidence to show that A. had made himself liable to third parties as if he were a partner; and B. and C. having become bankrupt, A. was allowed to prove against their estate for the advances he had made them.

\*Thirdly, with respect to the separate creditors. [\*728]

**3. Position of separate creditors.**— The principle which prohibits a partner from competing with the joint creditors of the firm evidently has no application as between one partner and the separate creditors of his copartners. Moreover, the lien which each partner has upon the assets of the firm must be satisfied before any part of the joint estate can be divided amongst the members of the firm, or, which comes to the same thing, be carried to the account of their respective separate estates. Therefore, after the joint debts of the firm have been paid, with interest to the date of the receiving order, (d) the surplus of the joint estate must be next applied in satisfaction of the liens of the individual partners upon it; (e) and it is the ultimate surplus only

(c) 2 M. D. & D. 339. See, also, *Ex parte Davis*, 4 De G. J. & S. 523, ante, p. 21. may prove as a creditor for arrears of salary.

(d) *Ex parte Findlay*, 17 Ch. D. 334. 3 De G. & S. 662, shows that a person intending to become a partner

(e) *Ex parte King*, 17 Ves. 115,

which is to be divided amongst the partners, or their respective separate estates, in proportion to their respective shares in the assets of the firm. It is hardly necessary to observe that a lien existing in favor of one partner increases his separate estate, and confers upon his separate creditors a right to prove against the joint estate in preference to the separate creditors of the other partners, who have no such lien. (*f*) If the joint estate is not sufficient to satisfy the lien the deficiency becomes provable against the separate estates of the indebted partners. (*g*)

**Surplus of joint estate.**—The joint debts being paid, and the liens of the individual partners on the partnership assets being satisfied, the surplus of the joint estate becomes divisible amongst the respective separate estates of the partners in proportion to their respective shares in the partnership property. The surplus of the joint estate, having been thus distributed, loses its character of joint estate, and becomes, to all intents and purposes, separate estate of the partners to whose credit it is carried. If any [\*729] joint estate is carried to a separate estate before the joint debts are paid and the partners' liens are satisfied, such joint estate will be ordered to be restored. (*h*).

### B. *Proof against the separate estates.*

**Administration of separate estate of partners.**—The principles according to which the separate estate of one partner is administered, in the event of an adjudication against him alone, are the same as those which govern the administration of the separate estates of the members of a

and 1 Rose, 212; *Ex parte* Reid, 2 (*g*) *Ex parte* Terrell, Buck, 345; Rose, 84; *Ex parte* Reeve, 9 Ves. *Ex parte* King, 17 Ves. 115; *Ex* 588; *Ex parte* Terrell, Buck, 245; *parte* Watson, Buck, 449, and 4 *Fereday v. Wightwick*, Tambl. 250; Madd. 477. And see, as to the last *Holderness v. Shackels*, 8 B. & C. case, 2 Gl. & J. 172.

612. (*h*) See *Ex parte* Lanfear, 1 Rose,

(*f*) *Ex parte* King, 17 Ves. 115; 442.  
*Ex parte* Reid, 2 Rose, 84.



bankrupt firm. (*i*) The leading principle in administering a separate estate is to prefer separate to joint creditors, just as in administering joint estate the leading principle is to prefer joint to separate creditors. But there is this important difference to be borne in mind: the separate creditors of one partner are not creditors of the firm, whilst the joint creditors of the firm are creditors of each of the partners composing it. For this reason it was formerly the rule to distribute the separate estate of each partner *pari passu* amongst his creditors, whether joint or separate; (*h*) and although this rule has been departed from, (*l*) the distinction in question naturally leads to important consequences, as will be seen hereafter.

The administration of the separate estates of bankrupt partners, and the administration of the separate estate of one bankrupt partner, if one alone is bankrupt, will be best explained by examining

1. The rights of the separate creditors,
2. The rights of the joint creditors,
3. The rights of the partners,

as against such estates or estate.

*\*First, with respect to the separate creditors.*

[\*730]

**1. Position of separate creditors.**— Except in those cases which will be specially noticed hereafter, the separate estate of each partner is to be first applied in payment of his separate creditors, (*m*) to the extent of 20s. in

(*i*) 46 and 47 Vict. ch. 52, § 40 (3) Copland, 1 Cox, 420; *Ex parte* and § 59, and Bank. Rules, 1886, Hodgson, 2 Bro. C. C. 5; *Ex parte* r. 269; *Ex parte* Taitt, 16 Ves. 197; Page, id. 119; *Ex parte* Flintum, Everett v. Backhouse, 10 Ves. 98. id. 120.

(*h*) *Ex parte* Blake, Cooke's Bank. Law, 528, ed. 8; *Ex parte* Cobham; *Ex parte* Haydon; *Ex parte* Caruthers; *Ex parte* Upton; Stephens ed. 8.

(*l*) See next note, and *Ex parte* Baudier, 1 Atk. 98; *Ex parte* Olk- now, Cooke's Bank. Law, 259, ed. 8.

(*m*) 46 and 47 Vict. ch. 52, §§ 40 (3) and 59, and Bank. Rules, 1886, r. 269; *Ex parte* Elton, 3 Ves. 233; *Ex parte* Abell, 4 Ves. 837; *Ex*

the pound on their provable debts, with interest up to the date of the receiving order; but not with interest after that date until the joint creditors have also received 20s. in the pound on their provable debts. (*n*)

A bankrupt's wife who has lent him money for the purpose of his business cannot compete with his other creditors (45 and 46 Vict. ch. 75, § 3). But this enactment does not preclude the wife of a partner from proving against the joint estate of the firm in respect of a loan to her husband and his copartners jointly. (*oo*)

After payment of the separate creditors of each partner, the surplus of his separate estate is carried to the credit of the joint estate; (*o*) and if the partner is a member of several bankrupt firms, the surplus of his separate estate must be divided amongst their respective joint estates in proportion to the amount of the debts proved against them respectively. (*p*)

*Secondly, with respect to the joint creditors.*

**2. Position of joint creditors — Cases in which they may compete with the separate creditors.**— Except [\*731] in the cases hereafter mentioned, the joint creditors of partners (*q*) are not entitled to payment out of

*parte* Clay, 6 Ves. 813; *Ex parte* Taitt, 16 Ves. 193. As to marshaling, see *ante*, p. 717.

(*n*) 46 and 47 Vict. ch. 42, § 40, cl. 5, and Sched. 2, r. 20, and *Ex parte* Findlay, 17 Ch. D. 334. Under the old law the separate creditors were not entitled to interest until the joint creditors had received 20s. in the pound on their principal debts. See *inter alia*, *Ex parte* Wood, 2 Mont. D. & D. 283; *Ex parte* Clarke, 4 Ves. 677; *Ex parte* Boardman, 1 Cox, 275; *Ex parte* Minchin, 2 Gl. & Jam. 287.

(*oo*) *Ex parte* Nottingham, 19 Q. B. D. 88.

(*o*) *Ex parte* Wood, 2 M. D. & D. 283, where the surplus of the separate estate of a bankrupt shareholder in a company being wound up in equity was held applicable to the payment of the creditors of the company, and not payable into court in the suit.

(*p*) *Ex parte* Franklyn, Buck, 332, where the order is given at length.

(*q*) As to co-debtors not partners see *Ex parte* Field, 3 M. D. & D. 95; *Ex parte* Buckingham, 1 M. D. & D. 235; *Ex parte* Crosfield, 1

Deac. 405.

their separate estates in competition with their separate creditors. (*r*) This is in accordance with the old law. (*s*) The Bankruptcy Act, 1883, mentions no exceptions, and it has not yet been decided that there are any; and, owing to the language of § 59 (1), it is doubtful whether they exist in cases where one partner only is bankrupt. But it would be strange if the exceptions existed (and it is apprehended that the first three do exist) where a separate estate is administered under a joint adjudication against a firm, and not where the separate property of one partner is administered under an adjudication against himself alone. (*t*)

The exceptions are four in number. The first exists where there is no joint estate; the second where the property of the firm has been fraudulently converted; the third where there has been a distinct separate trade, in respect of which a separate debt has been contracted; the fourth is in favor of the petitioning creditor himself. (*u*)

**1. Exception where there is no joint estate.**—If, in the case of a bankrupt firm, there is no joint estate, the joint creditors are entitled to rank as separate creditors against the separate estates of the individual partners. (*x*) So, if one partner only is bankrupt, the creditors of the firm are entitled to rank as separate creditors against the separate estate of the bankrupt if there is no joint estate, (*y*) and if

(*r*) 46 and 47 Vict. ch. 52, § 40 (3), and § 59 (1), *ante*, p. 693.

(*s*) See 6 Geo. 4, ch. 16, § 62; Yate, Lee and Wace's Law of Bankruptcy, 243, ed. 3; Robson on Bankruptcy, 735, 736, ed. 6.

(*t*) See Yate, Lee and Wace, *ubi supra*. Mr. Robson (Law of Bank. 736, ed. 6) doubts whether the exceptions exist any longer.

(*u*) *Qu.* as to this. See Robson, Bank. 736, note (1), ed. 6. The older cases establishing the exception are *Ex parte* Hall, 9 Ves. 349; *Ex parte* Ackerman, 14 Ves. 604; *Ex*

*parte* De Tastet, 17 Ves. 247; *Ex parte* Burnett, 2 M. D. & D. 357, reversing S. C. 1 id. 608, where the petitioning creditor was a joint creditor in respect of one demand and a separate creditor in respect of another.

(*x*) See the next note.

(*y*) See *Ex parte* Hayden, 1 Bro. C. C. 453; *Ex parte* Sadler, 15 Ves. 52; *Ex parte* Bradshaw, 1 Gl. & Jam. 99; *Ex parte* Bauerman, 3 Deac. 476, and the next three notes.

[\*732] there is no solvent ostensible partner, (z) or, at all events, none in this country. (a)

**One partner dead, solvent.**—The fact that the estate of a deceased partner is solvent does not deprive the joint creditor of his right against the separate estate of the bankrupt. (b) This was so before the Judicature Acts, because, the legal remedy surviving against the latter, the creditor had no *locus standi* at law against the representatives of the deceased; and the Judicature Acts leave the old rule untouched, as the joint creditors of the firm are not separate creditors of a deceased partner, as has been pointed out in an earlier portion of the work. (c)

Again, if several firms enter into a joint adventure, and one of them becomes bankrupt, the joint creditors of all the firms may prove against the joint estate of the bankrupt firm if the partners in the solvent firms are abroad and there are no assets belonging to all the firms jointly. (d)

**Joint estate small.**—If there is any joint estate, however small, the joint creditors will not be permitted to rank *pari passu* with separate creditors against the separate estate. (e) But where one partner only is bankrupt nothing can be treated as joint estate by reason only of the

(z) See *Ex parte Kensington*, 14 Ves. 447; *Ex parte Janson*, 3 Madd. 229. This last case shows that for

this purpose a person who is not bankrupt is solvent. The existence of a dormant partner is immaterial. See *Ex parte Chuck*, 8 Bing. 469; *Ex parte Hodgkinson*, 19 Ves. 294; *Ex parte Norfolk*, id. 458.

(a) *Ex parte Pinkerton*, 6 Ves. 814, n.

(b) *Ex parte Bauerman*, 3 Deac. 476. The creditors of the survivor could not insist on the creditors of the firm going against the estate of the deceased, because there is no marshaling except as between

creditors of one and the same debtor. See acc. *Ex parte Kendall*, 17 Ves. 514.

(c) See *Kendall v. Hamilton*, 4 App. Ca. 504, and *ante*, pp. 193, 598.

(d) *Ex parte Nolte*, 2 Gl. & J. 295, overruling *Ex parte Wylie*, 2 Rose, 393; *Ex parte Machel*, 1 Rose, 447.

(e) *Ex parte Kennedy*, 2 De G. M. & G. 228; *Ex parte Peake*, 2 Rose, 54; *Ex parte Harris*, 1 Madd. 583. Compare *Ex parte Burdekin*, 2 M. D. & D. 704; *Ex parte Birley*, id. 354.

doctrines of reputed ownership; (*f*) and joint property which is pledged for more than its value, or which, for any other reason, cannot, to any extent, be made available for the benefit of the creditors of the firm, is treated, with reference to the rule in question, as having no existence. (*g*) In *Ex parte \*Geller* (*h*) it was accordingly [\*733] held that a joint creditor who had sold property of the firm, which had been pledged to him for more than its value, might, there being no other joint property, prove so much of his debt as remained unpaid against the separate estates of the partners. A joint creditor holding a pledge belonging to the firm must sell it or have it valued before he can claim to rank as a separate creditor, for until he has done that he is not in a position to say that there is no joint estate. (*i*)

If it is doubtful whether there is any joint estate or not an inquiry will be directed. (*k*)

**Reimbursing separate estate on subsequent realization of joint estate.**—If joint creditors prove against the separate estate of any partner, and obtain a dividend thereout upon the assumption that there is no joint estate, and joint estate is afterwards realized, the separate estate is entitled to be repaid the amount paid to the joint creditors. (*l*)

**Joint creditors may pay separate creditors.**—Joint creditors can acquire a right to prove against the separate estate of any partner by paying his separate creditors 20s. in the pound on the amount of their provable debts. (*m*)

(*f*) *Ex parte* Taylor, 2 M. D. & D. 753. See *ante*, p. 685.

(*g*) See *Ex parte* Peake, 2 Rose, 54; *Ex parte* Hill, 2 Bos. & P. N. R. 191, note. But see *Ex parte* Clay, 1 Mont. Part. 223, note; *Ex parte* Kennedy, 2 De G. M. & G. 228.

(*h*) *Ex parte* Geller, 2 Madd. 262.

(*i*) This follows from *Ex parte* Smith, 2 Rose, 64; *Ex parte* Barclay, 1 Gl. & J. 272, and cases of that class. In *Ex parte* Hill, 2 B.

& P. N. R. 191, note, the pledge had been sold, and the creditor proved for the difference.

(*k*) *Ex parte* Birley, 1 M. D. & D. 387. And see S. C. 2 id. 354.

(*l*) See *Ex parte* Willock, 2 Rose, 392.

(*m*) See *Ex parte* Chandler, 9 Ves. 35, and *Ex parte* Taitt, 16 Ves. 193. See as to interest, *ante*, pp. 719, 720.

**2. Exception in the case of fraud.**—It has been already seen that if a partner's separate property has been fraudulently converted by his copartners to the use of the firm which becomes bankrupt the property so converted cannot be treated as part of the joint estate, but must be placed to the separate account of the defrauded partner. (*n*) Upon the same principle, if a partner has fraudulently converted to his own use property which in truth belongs to the firm, such property cannot be treated as a part of his separate estate, but forms part of the joint estate of the firm.

Hence, as in the former case, proof on behalf of the [\*734] separate estate is admitted against the joint \*estate, (*o*) so in the latter case, if the firm is bankrupt, proof on behalf of the joint estate is admitted against the separate estate, (*p*) although that estate may not in the result be greater by reason of the fraud. (*q*) Moreover, if the firm is not bankrupt, proof on behalf of the solvent partners is admitted against the estate of their bankrupt copartner; and in this case the solvent partners rank as separate creditors, although the property fraudulently appropriated by the bankrupt belonged not to them exclusively, but to them jointly with himself. (*r*)

**No sufficient fraud.**—Whether in any particular instance there has been a fraudulent misappropriation of the partnership property or not must of course be determined by the facts of each case. It may, however, be observed that the mere circumstance that one partner is indebted to the firm is no proof of fraud; and even if he has acted in violation of the articles of partnership it may be found that those articles have by common consent been habitually

(*n*) *Ante*, p. 725.

(*o*) *Ex parte* Harris, 2 V. & B. 210; S. C. 1 Rose, 437; *Ex parte* Sillitoe, 1 Gl. & J. 382.

(*p*) *Ex parte* Lodge and Fendal, 1 Ves. Jr. 166; *Ex parte* Smith, 1 Gl. & Jam. 74; *Ex parte* Watkins, Mont. & McA. 57; *Ex parte*

Cust, Cooke's Bank. Law, 531, ed. 8.

(*q*) *Lacey v. Hill*, 4 Ch. D. 537, affirmed on appeal under the name *Read v. Bailey*, 3 App. Ca. 94.

(*r*) *Ex parte* Yonge, 3 V. & B. 31, and 2 Rose, 40. The judgment in this case is very masterly.

ignored. To bring a case within the exception now under consideration the individual partner must in effect have stolen the property of the firm, and his breach of good faith must not have been acquiesced in or condoned by his copartners. (s) Any arrangement by which a debt arising from fraud is made a matter of mere partnership account precludes the firm from ranking, in respect of that debt, as a separate creditor against the separate estate of the individual partner. (t)

The leading cases on the subject are *Fordyce's Case* and *Ex parte Lodge and Fendal*.

In *Fordyce's Case*, (u) A., B., C. and D. were partners as bankers, and had in the course of their business discounted a number of bills and notes which had thus become the property \*of the firm. A. fraudulently applied [\*735] to his own use some of these bills and notes. He was subsequently adjudged bankrupt, and shortly afterwards the firm itself was adjudged bankrupt. The assignees of the firm claimed to prove as separate creditors of A., in competition with his other separate creditors and against his separate estate, for the value of the bills and notes thus abstracted, and they were allowed so to do. But in this same case the assignees were not allowed to prove against A.'s separate estate for what the joint estate had been compelled to pay in respect of bills issued by him in the partnership name for private uses of his own.

In *Ex parte Lodge and Fendal*, (x) the facts were in substance as follows: John Lodge and his two sons, James and John, were partners. John Lodge, the father, died, having bequeathed his residuary personal estate to his two sons and appointed them and their mother his executors. After the death of the father his two sons continued to carry on

(s) See *Ex parte Yonge*, 3 V. & B. 31; *Ex parte Smith*, 1 Gl. & J. 74, and 6 Madd. 2; *Ex parte Turner*, 4 D. & Ch. 169; *Ex parte Crofts*, 2 Deac. 102; *Ex parte Hinds*, 3 De G. & Sm. 613.

(t) See *Ex parte Turner*, 4 D. & C. 169.

(u) Also known as *Ex parte Cust*, Cooke's Bank. Law, 531, ed. 8.

(x) 1 Ves. Jr. 165, and Cooke's Bank. Law, 530, ed. 8.

the old business together for two years, when they dissolved partnership. No accounts were taken, but it was arranged that James should pay the debts of the firm. James immediately entered into a new partnership with Fendal. Fendal brought in 12,000*l.* as his share of the capital, and James Lodge brought in the same amount in stock and goods. After this, James Lodge, without Fendal's knowledge or consent, applied the assets of the new firm in paying the debts of the old firm and the private debts of himself, James Lodge. Ultimately James Lodge and his partner, Fendal, became bankrupt. The joint creditors of the two partners Lodge and Fendal petitioned for liberty to prove against James Lodge's separate estate and in competition with his separate creditors for the amount of the assets of Lodge and Fendal thus improperly applied. Lord Thurlow, relying on *Fordyce's Case*, expressed a strong opinion in favor of the proof and allowed it *de bene esse*. But, after taking time to consider, his lordship "thought he could not permit the assignees under the joint commission to prove against the separate estate of Lodge, without deciding upon a principle that must apply to all cases and constantly occasion the taking an account between [\*736] the partners and the partnership \*in every joint bankruptcy. He said that if the affidavits had gone the length of connecting the bankruptcy with the institution of the partnership trade, and that Lodge, with a view of swindling Fendal out of his property, had got him into the trade, and then taken the effects of the partnership into his own hands with a view to his separate creditors, it might have been different. The petition on the part of the joint creditors to prove against the joint estate was dismissed." (y)

**3. Exception in the case of distinct trades.**—The same principle which, in the event of the bankruptcy of a firm, allows proof to be made on behalf of one of its members

(y) The passage in inverted commas is taken from Cooke's Bank. Grill, *id.* Law, 530, ed. 8. See, further, as to the necessity of fraud, *Ex parte*



against its joint estate in respect of a debt contracted by the firm to him as a distinct trader (z) also allows proof to be made on behalf of the joint estate of a firm against the separate estate of one of its partners who has carried on a trade distinct from that of the firm, and has become indebted to it in the ordinary course of his distinct trading. If, therefore, a person who is a partner in a trading firm carries on a distinct trade of his own, and becomes indebted to the firm for goods sold to him in the way of their trades, and then becomes bankrupt, the firm is treated as a separate creditor for the debt so contracted, and is allowed to prove accordingly. (a) So, in the case of a bankrupt firm, proof for debts thus contracted by an individual partner is allowed as between the joint estate of the firm and the separate estate of that partner in competition with his separate creditors. (b) As Lord Eldon put it in *Ex parte St. Barbe*, "a joint trade may prove against a separate trade, but not a partner against a partner." But although there may have been distinct trades, still if the debt in question has not been contracted in the ordinary course of carrying them on, such proof will not be allowed. (c)

\*In *Ex parte Gliddon* (d) an ingenious attempt was [\*737] made to obtain the benefit of the above rule in a case where, although there were two firms in appearance, there was really only one and an agent, and no such separate trading as the exception requires. In appearance there were two firms, A. and B., and C. and D.; but D. was only C.'s agent; and C. himself was only A.'s agent; but neither B. nor D. knew this to be so. Both firms became bankrupt, and C. and D. were indebted to A. and B. An attempt was made by the trustee of A. and B. to prove

(z) *Ante*, p. 725.

(a) *Ex parte Hesham*, 1 Rose, 146; *Ex parte Castell*, 2 Gl. & J. 124; *Ex parte Johns*, Cooke, B. L. 538, and Wats. Part. 286.

(b) *Ex parte St. Barbe*, 11 Ves. 413.

(c) See, as to this, *ante*, p. 726, and *Ex parte Hargreaves*, 1 Cox, 440; *Ex parte Sillitoe*, 1 Gl. & J. 382; *Ex parte Williams*, 3 M. D. & D. 433, there cited.

(d) *Re Wakeham*, or *Ex parte Gliddon*, 13 Q. B. D. 43.

against the separate estate of D. for the debt due from C. and D. to A. and B. But it was held that there was no such trading between A. and B. on the one side and D. on the other as was necessary to create a provable debt. The circumstances were such as to negative the existence of any debt from D. to A. and B. The real debt was owing by A. to A. and B.

*Thirdly, with respect to the partners.*

**3. Position of the partners.**—The principle that a debtor shall not be allowed to compete with his own creditors is as strictly carried out in administering the separate estates of individual partners as in administering the joint estate of a firm. The separate estate of each partner is liable to the debts of the firm, subject only to the prior claims of his separate creditors; whence it is obvious that one partner cannot compete with the separate creditors of his copartner without diminishing the fund which, subject to their claims, is applicable to the payment of the joint debts, and therefore of his own creditors. In other words, the rights of the joint creditors preclude one partner from ranking as a separate creditor of his copartner until the joint creditors are paid in full. (e) Moreover, it is now settled, in opposition to some older cases, (f) that a solvent partner is not entitled to rank as a creditor against the estate of his bankrupt copartner upon indemnifying that estate against the [\*738] claims of the joint \*creditors; he must show that those claims are discharged or otherwise barred. (g)

(e) See, accordingly, *Ex parte Collinge*, 4 De G. J. & S. 533, where the result of such proof would have benefited the joint creditors; *Ex parte Carter*, 2 Gl. & J. 233, where an executor of a deceased partner sought to prove; *Ex parte Ellis*, id. 312; *Ex parte Rawson*, Jac. 274; *Ex parte Robinson*, 4 D. & Ch. 499; *Ex parte May*, 3 Deac. 382.

(f) Viz., *Ex parte Taylor*, 2 Rose, 175; *Ex parte Ogilvy*, id. 177.

(g) *Ex parte Moore*, 2 Gl. & J. 166. Compare *Ex parte Andrews*, 25 Ch. D. 505, where the possibility of a claim being made was held not enough to prevent the executors of one partner from proving against the surviving partner. The joint liability in that case was really visionary only.

**Assignee of solvent partner.**—Although a partner cannot prove against his copartner so long as the joint debts are unpaid, yet, if a debt owing by the bankrupt partner to his copartner has been canceled, and in consideration thereof the bankrupt has taken upon himself a debt due from his copartner to a third party, this debt, so substituted for the first, may be proved by such third party in competition with the other separate creditors of the bankrupt, whether the joint creditors are paid or not. (*h*)

**Proof by firm against estate of bankrupt partner.**—The disability of a partner to prove in competition with his own creditors prevents proof by a firm to which he belongs against his own separate estate; for proof by such a firm is obviously nothing more than proof by himself and copartners. (*i*)

The principle which allows joint estate to prove against separate estate, and separate estate to prove against joint estate, in cases where there has been a fraudulent conversion of property, or where there have been distinct trades, and a debt contracted in the course of those trades, is also applicable to proofs by one partner against another in similar cases. (*j*) Moreover, if A., intending to become a partner with B., advances him money as his, A.'s, share of the common stock, and before the partnership is entered into B. becomes bankrupt, A. may prove against B.'s separate estate as a separate creditor for the amount of the advance, unless A., without being a partner, has made himself liable to creditors as if he were one. (*k*)

**\*Partnership induced by fraud.**—At one time it [\*739] was supposed that when a person had been induced

(*h*) *Ex parte* Todd, De Gex, 87.

(*i*) See acc. *Ex parte* Smith, 1 Gl. & J. 74, and 6 Madd. 2; *Ex parte* Turner, 4 D. & Ch. 169.

(*j*) See *Ex parte* Westcott, 9 Ch. 626, as to proving for a *devastavit* by an executor; *Ex parte* Maude, 2 Ch. 550, where two solvent copart-

ners sought to prove against the separate estate of their bankrupt partner. See *ante*, p. 726.

(*k*) *Ex parte* Turquand, 2 M. D. & D. 339, *ante*, p. 727; and as to money payable to a person in lieu of his being taken into partnership, see *Ex parte* Megarey, De Gex, 167.

by the fraud of another to join him in partnership the former could not, on the bankruptcy of the latter, prove against his separate estate for the amount paid to the bankrupt as a consideration for the partnership. This opinion was founded on the case of *Ex parte Broome*. (*l*) There A. was induced, by the false and fraudulent representations of B., to enter into partnership with him and to pay him a considerable premium. Shortly afterwards B. became bankrupt, and A. sought to recover out of B.'s estate the amount of the premium paid as above mentioned. According to the report this was refused upon the ground that, although A. might be entitled to recover the money as between himself and B., yet he was liable with B. to third persons, viz., the creditors of the firm.

The report of this case, however, is not warranted by the order which was actually made in it. (*m*) Indeed, the order expressly directed that A. should be at liberty to prove against B.'s estate, and that A. should be paid a dividend in respect of his proof, ratably with B.'s other creditors. This order is in conformity with the opinion expressed by Lord Thurlow in *Ex parte Lodge and Fendal*, and with the cases of *Hamil v. Stokes* (*n*) and *Bury v. Allen*. (*o*)

**Proof by company against estate of shareholder.**—The application of the foregoing doctrines to cases where a shareholder in an unincorporated company has become bankrupt, and the company seeks to prove as a creditor against his separate estate, and in competition with his other separate creditors, has given rise to some difficulty. But in *Ex parte Davidson* (*p*) it was held that the public officer of a banking company, governed by 7 George 4, chapter 46, might prove against the separate estate of one of its mem-

(*l*) 1 Rose, 69.

(*m*) See the order in 1 Coll. 598.

(*n*) Dan. 20, and 4 Price, 166.

See, on this case, 1 Mont. Part. 210.

(*o*) 1 Coll. 589.

(*p*) 1 M. D. & D. 648, and on ap-

peal, *sub nomine* *Re Caldecott*, 2 id.

368, settling the doubts raised in

*Ex parte Marston*, Mon. & Ch. 576;

*Ex parte Prescott*, id. 611; *Ex parte*

Law, id. 590; and *Ex parte Snape*,

id. 607.

bers for what was due from him as a customer of the company in respect of his overdrawn account, although the company (including therefore the bankrupt) was itself indebted to other persons; and in *Ex parte \*Ball (q)* [\*740] it was held that a liquidator of an unregistered and unincorporated company being wound up under the Companies' Act, 1862, was entitled to prove against the estate of a bankrupt shareholder in respect of a call made in the winding up. The same rule applies *a fortiori* to the case of an incorporated company. Excepting, therefore, those companies which are merely large partnerships, not empowered to sue and be sued by a public officer, and not being wound up, it is now settled that where a member of a company becomes bankrupt, the company, whether its debts are paid or not, may prove as a separate creditor of such member for what is due from him to it, either in respect of calls (*r*) or other matters. (*s*) But the company, if it holds a security of the bankrupt for what is so due, must realize the security and prove for the difference as in ordinary cases. (*t*)

**One partner may rank as a separate creditor of his copartner, provided the joint creditors are not prejudiced.** Hitherto the right of one partner to rank as a separate creditor of his copartner has been considered solely with reference to joint creditors; it is necessary, however, also to notice it with reference to separate creditors. They are obviously benefited by the rule which prevents one partner from proving against the separate estate of his copartner; but it is not for their sake that such rule has been estab-

(*q*) 10 Ch. 48.

(*r*) *Ex parte Brown*, 3 De G. & S. 590; *Ex parte Nicholas*, 2 De G. M. & G. 271. See 19 and 20 Vict. ch. 47, § 90.

(*s*) *Ex parte Davidson*, 1 M. D. & D. 648, and 2 id. 368; *Ex parte Cooper*, 2 M. D. & D. 1; *Ex parte Wallis*, id. 201. *Ex parte Wood-*

roffe, Fonbl. Bank. Ca. 14, cannot be supported.

(*t*) *Ex parte Manchester and County Bank*, 3 Ch. D. 481; *Ex parte Cooper*, 2 M. D. & D. 1; *Ex parte Wallis*, id. 201. See, also, *Ex parte Connell*, 3 Deac. 201, where the security consisted of shares in the company itself.

lished; and where the reason for the rule ceases to exist the rule itself ceases to be applicable. Hence, if there never were any joint debts, or if all those which once existed have ceased to exist, (*u*) either because they have been paid, barred, satisfied, or converted into separate debts, then one partner who is a creditor of another may, on the bankruptcy of the latter, prove against his separate estate in competition with his other separate creditors.

[\*741] \*A leading case on the subject is *Ex parte Grazebrook*; (*v*) there a dormant partner had retired, and the continuing partner continued the business, and was adopted as the sole person liable to pay the debts formerly due from the firm. On the retirement of the dormant partner the accounts of the firm were taken and settled, and a balance was found due to him. On the bankruptcy of the continuing partner the dormant partner was allowed to prove as a separate creditor for the amount of the balance so found due, although there were partnership debts still unpaid, because these debts had been converted into the separate debts of the continuing partner, and by the statement of the account the latter had become debtor for the balance in question to his late copartner.

**Effect of paying joint debts.**—Again, if one partner has paid the joint debts, he is entitled to prove as a separate creditor of his copartner for the amount of the share which ought to have been paid by him; (*w*) and it is immaterial whether the debts have been paid before or since the bankruptcy. (*x*)

(*u*) *Ex parte Andrews*, 25 Ch. D. 505, seems to show that it is enough if they have not been proved, and are not likely to be so.

(*v*) 2 D. & Ch. 186. See, too, *Ex parte Gill*, 9 Jur. N. S. 1303; *Ex parte Hall*, 3 Deac. 125. In *Ex parte Dodgson*, Mont. & MacAr. 445, there were no joint debts. So in *Ex parte Davis*, 4 De G. J. & S. 523, noticed *ante*, p. 21.

(*w*) See *Ex parte Watson*, 4 Madd. 477; *Ex parte Carpenter*, Mont. & MacAr. 1; *Wood v. Dodgson*, 2 M. & S. 195. In the two last cases the partner who had paid the debts had retired and been indemnified against them by the bankrupt.

(*x*) See, in addition to the cases in the last note, *Moody v. King*, 2 B. & C. 558; *Parker v. Ramsbot-*

In cases of this sort, moreover, the amount provable against each bankrupt is ascertained, not by dividing the whole amount of the debts paid by the number of partners, or by the number of shares held by them without reference to their ability to pay, but by treating each partner as liable to contribute his own share, calculated as above, and also to contribute, as surety for the rest, to the payment of what is due from them, but which they are themselves unable to pay. Those, in fact, who can pay must make up for those who cannot. (*y*)

**Proof of what is not satisfied by lien.**—Again, although where one partner is indebted to the \*firm, [\*742] and the lien upon his share is insufficient to satisfy such debt, the deficiency cannot be proved against his separate estate in competition with the joint creditors of the firm, or until they are paid, (*z*) yet such deficiency is provable against his separate estate in competition with his separate creditors, where the rights of the joint creditors do not intervene. (*a*)

**Separate estate insolvent.**—Further, if the separate estate of a partner is clearly insufficient to pay his separate debts, excluding that which he owes to his copartner, the latter is entitled to prove; for, *ex hypothesi*, there is no possibility of any surplus out of which the joint creditors can be paid anything whatever. They therefore are in no way prejudiced by the proof. (*b*)

But even in cases in which the right to prove exists the

tom, 3 B. & C. 257; *Ex parte* Young, 2 Rose, 40. entitled to be paid interest before the copartners receive anything.

(*y*) See *Ex parte* Hunter, Buck, 552; *Ex parte* Moore, 2 Gl. & J. 172; *Ex parte* Plowden, 2 Deac. 456, and 3 M. & A. 402, overruling *Ex parte* Watson, Buck, 449, and *Ex parte* Smith, id. 492. (*a*) *Ex parte* Terrell, Buck, 345; *Ex parte* King, 17 Ves. 115; *Ex parte* Watson, Buck, 449, and 4 Ma id. 477. And see, as to this last case, 2 Gl. & J. 172.

(*z*) *Ex parte* Carter, 2 Gl. & J. 233; *Ex parte* Ellis, id. 312; *Ex parte* Reeve, 9 Ves. 588, which shows that the joint creditors are (*b*) *Re* Levey, 4 De G. J. & S. 551. See, also, *Ex parte* Sheen, 6 Ch. D. 235, where the proof was by a person who had held himself out as a partner.

proof cannot be admitted without taking the partnership accounts; for if they are taken the debt sought to be proved may be found to be balanced, and not really to exist. (c)

**Surplus of joint estate when administered under a separate adjudication.**—Before leaving this subject it may be remarked that where one partner only is bankrupt, and his trustee administers the joint estate of the firm, as well as the separate estate of the bankrupt, and there is an ultimate surplus, that surplus ought to be divided between the bankrupt and the solvent partners according to their respective interests therein.

In *Ex parte Lanfear*, (d) one of two partners became bankrupt, and the other died. The bankrupt partner having paid all his creditors 20s. in the pound, the surplus of the joint and of his separate estate was ordered to be paid over to him, and it was paid over accordingly. The executor of the deceased partner, however, applied for an order that the bankrupt might account for what was due to the deceased in respect of his interest in the surplus of [\*743] the joint estate, and that the money \*which had been restored might be paid into court, and an order to that effect was made.

### C. *Proof against both the joint and the separate estates.*

#### *First, general rule as to election.*

**Rights of joint and separate creditors.**—With a view to avoid as much as possible any interruption in the statement of the principles according to which the conflicting rights of the creditors of the firm and the separate creditors of the individual partners are adjusted, the consideration of the position of those creditors who are both *joint and separate* (i. e., of those who, in respect of the same debt, have the option of suing either all the partners jointly or some or one of them separately from the others) has been hitherto postponed.

(c) See *Ex parte Maude*, 2 Ch. 550. (d) 1 Rose, 442.



In order that a creditor may rank as a joint and separate creditor it is necessary that there should be two distinct rights vested in him at the same time, by virtue of which he is enabled to pursue either of the two remedies above alluded to. The modes in which these rights are acquired and lost have been already investigated (Bk. II, ch. 2), and consequently it is unnecessary to refer to that subject in the present place.

**Rule against double proof.**—Subject to the exception which will be noticed presently, a person to whom the members of a firm are bound jointly and severally is not allowed in bankruptcy to rank as a creditor both against the joint estate and also against the separate estates, or any of them; he is compelled to elect whether he will rank as a joint creditor or as a separate creditor. (e) If he elects to rank as a joint creditor he must, like other joint creditors, go in the first place against the joint estate, and he has no greater rights than they against the separate estates, or any of them; whilst, on the other hand, if he elects to rank as a separate creditor, he must, like other separate creditors, confine himself in the first place to the separate estates, and he has no greater rights than they to the joint estate. (f)

**\*Reason of the rule.**—The reasoning upon which [\*744] this rule is founded is as follows: If the members of a firm are bound jointly and severally the creditor may sue them all jointly, or he may sue all or any of them separately, but he cannot do both; and as he cannot do both before bankruptcy, neither ought he to do what is tantamount to the same thing after bankruptcy. It is very true that if he sues them all jointly he can levy execution against the property of the partnership, or against the private property of each member, or against both at once; but so can any joint creditor. So far as analogy goes, therefore, there

(e) See *Ex parte Bond*, 1 Atk. 98; *Bevan*, 10 Ves. 106; *Ex parte Hay*, *Ex parte Banks*, id. 106; *Ex parte* 15 Ves. 4.

*Rowlandson*, 3 P. W. 405; *Ex parte* (f) *Ex parte Bevan*, 10 Ves. 106; *Bradley v. Miller*, 1 Rose, 273.

is no reason why a joint and separate creditor should be allowed to go against both estates at once, whilst a creditor who is merely joint is compelled to go against the joint estate before he can go against the separate estate. (*g*) Nor is this all. The grand principle in bankruptcy is, as far as possible, to distribute the bankrupt's estate equally amongst all his creditors, and not to prefer one creditor to another. Now, if a joint and separate creditor were to be allowed to prove against both estates at once, he would diminish the separate estate to the prejudice of the joint creditors, and diminish the joint estate to the prejudice of the separate creditors, and gain an advantage over them both. (*h*) Such are the reasons which induced the courts to hold that a joint and separate creditor ought not, as a rule, to be allowed to go against both estates at once, but that he should be compelled, like other creditors, to go in the first instance against one estate only. In giving the option to him the courts act in analogy to the rule by which a joint and separate creditor can, as he pleases, sue his debtors jointly or separately.

**Examples of the rule.**—In conformity with the rule thus established, and excepting always the statutory exceptions to be noticed presently, a creditor who is a joint creditor by one instrument, and a separate creditor by a distinct instrument, is as much compelled to elect as if his joint [*\*745*] and separate rights were conferred by one \*and the same instrument; (*i*) and if a firm has been implicated in a breach of trust, the *cestui que trust* (who thereby acquires a right available against all the partners jointly, as well as against each of them separately) cannot prove

(*g*) See *Ex parte Rowlandson*, 3 P. W. 405; *Ex parte Banks*, 1 Atk. 106; *Ex parte Bond*, id. 98. Lord Eldon followed the rule, but disapproved it. See *Ex parte Bevan*, 9 Ves. 225, and 10 id. 109.

(*h*) See *per* Lord Hardwicke in *Ex parte Bond*, 1 Atk. 100.

(*i*) *Ex parte Hill*, 2 Deac. 249. *Ex parte Vaughan*, 3 P. W. 407, is not law. Query, if double proof will not be now allowed in all such cases as these. See *Ex parte Honey*, 7 Ch. 278, *infra*, p. 748.

against the joint and separate estates at the same time, but must elect against which he will prove, as if he were an ordinary joint and separate creditor. (*j*) The same rule applies in cases of fraud. (*k*)

**Rule presupposes a creditor to be a joint as well as a separate creditor.**—The doctrine of election, however, only applies where a creditor is, properly speaking, a creditor as well of the firm jointly as of some or one only of its members separately. Where, therefore, a firm has been dissolved, and the continuing partner is to pay all the debts of the firm, then, inasmuch as a creditor of the firm is in no way affected by this arrangement unless he accedes to it, he has not, without having acceded to it, any right, in the event of bankruptcy, to stand as the separate creditor of the continuing partner in respect of the old debt. Under such circumstances he has no right of election, but must rank as a joint creditor. (*l*)

**Election against which estate to prove.**—The rule as to election would obviously be wholly useless unless an election once deliberately made were held to be final. (*m*) On the other hand, it would operate with great harshness if a creditor were held to have finally elected, when, in point of fact, he was not in a position to judge which course it would be best for him to adopt. It becomes, therefore, necessary, before leaving this subject, to examine the circumstances which have, and those which have not, been held to bind the creditor in this respect.

**Election, when conclusive.**—In those cases in which a creditor has been held to have made his election beyond recall, it will be found that he acted \*not [\*746]

(*j*) *Ex parte* Barnewall, 6 De G. M. & G. 795; *Ex parte* Chandler, *Re* Davison, 13 Q. B. D. 50. Compare *Ex parte* Sheppard, 19 Q. B. D. 84, *infra*, p. 749, where the act applied.

(*l*) *Ex parte* Freeman, Buck, 471; *Ex parte* Fry, 1 Gl. & J. 96. And see *ante*, p. 705.

(*m*) A surety is apparently bound by the election of the principal creditor. See *Ex parte* Carne, 3

(*k*) *Ex parte* Adamson, 8 Ch. D. 807. Ch. 463.

only with a full knowledge of his position, and of the material facts of the case, but also in some manner quite inconsistent with the character which he has subsequently sought to assume. (*n*)

**Creditor entitled to know how estates stand before he elects.**—That which is principally calculated to influence the creditor's choice is the comparative solvency of the joint and of the separate estates; and in order to make his election he must have a reasonable time to inquire into the state of the different funds. He is entitled to defer his election until a dividend is declared, or at least until the trustee is possessed of a fund to make a dividend; (*o*) and in a case where a large number of creditors had a right of election, and the estates were not so ascertained as to enable the creditors to elect, a temporary order was made that no larger dividend should be declared of the one than of the other estate. (*p*)

**Election, when not considered as made.**—A joint and separate creditor ought, it seems, to prove against both estates, but elect which he will be paid out of before he takes a dividend; (*q*) and a creditor who, having a right of election, proves against one estate rather than another, will not be permitted to transfer his proof without showing the grounds which have induced him to change his mind. (*r*) But the mere fact of his having proved against one estate will not, if he has received no dividend from it, preclude him from proving against the other estate, provided he does not seek to disturb any distribution of it which may already

(*n*) As in *Ex parte Liddel*, 1 Rose, ed. 8, *Ex parte Butlin*, there cited; 34. And see *Ex parte Adam*, 1 Ves. *Ex parte Bond*, 1 Atk. 98; *Ex* & B. 494; *Bradley v. Miller*, 1 Rose, *Ex parte Bentley*, 2 Cox, 218. 273; *Ex parte Borrodailes*, 1 Mont. (*p*) *Ex parte Arbouin*, De Gex, Part. 129, Appx., was a somewhat similar case. See, too, *Ex parte Solomon*, 1 Gil. & J. 25; *Couldery v. Barturum*, 19 Ch. D. 394. (*q*) *Ex parte Bentley*, 2 Cox, 218. (*r*) *Ex parte Dixon*, 2 M. D. & D. 312.

(*o*) See *Cooke's Bank. Law*, 275,

have been made. (s) And even if the creditor has not only proved but received a dividend, still, if he can show that he did so in ignorance of material facts, he will be allowed to vary his proof on refunding the dividend he has received, with interest. (t)

**\*Position of petitioning creditor.**—A joint and [\*747] separate creditor who petitions for adjudication of bankruptcy against a firm thereby *prima facie* elects to be treated as a joint creditor; (u) but if, instead of petitioning against the firm, he petitions for a separate adjudication against one of the partners, he may afterwards declare whether he will be treated as a joint or as a separate creditor. (v) And if the separate adjudication is afterwards superseded in consequence of an adjudication against the firm, the creditor is restored to his right of election under the bankruptcy of the firm, and is not prejudiced by anything he may have done in the former bankruptcy. (w)

*Secondly, cases in which double proof is allowed.*

**Exception to the rule against double proof.**—The rule which excludes a joint and separate creditor from receiving dividends from two estates at once was subject to an exception where each estate represented a different trade carried on by a different firm. For example, if a firm, A., B. and C., carrying on one business, drew a bill on a firm, A., B. and D., carrying on a distinct business, and the bill was accepted and circulated, a holder of the bill was permitted to rank as a creditor of both firms at the same time, and

(s) *Ex parte* Bielby, 13 Ves. 70;  
*Ex parte* Masson, 1 Rose, 159.

(t) *Ex parte* Adamson, 8 Ch. D. 807; *Ex parte* Rowlandson, 3 P. W. 405; *Ex parte* Bolton, 2 Rose, 389; S. C., Buck, 7; *Ex parte* Husbands, 2 Gl. & J. 4, reversing S. C. 5 Madd. 419; *Ex parte* Law, 3 Deac. 541, and Mon. & Ch. 111. See, also, the next note.

(u) That he may be allowed to withdraw his joint proof and prove against the separate estates, or one of them, see *Ex parte* Chandler, *Re* Davison, 13 Q. B. D. 50.

(v) See *per* Lord Eldon in *Ex parte* Bolton, 2 Rose, 390, 1.

(w) *Ex parte* Brown, 1 Rose, 433, and 1 V. & B. 60; *Ex parte* Smith, 1 Gl. & J. 256.

to obtain dividends from their respective estates accordingly.

**Reason of the exception.**—The principle upon which this exception was founded was that there were distinct trades carried on with distinct capitals, and that the debts of each trade were properly payable out of the assets of the persons who carried it on, whether those debts were collaterally secured or not. (*x*) If this principle had been logically carried out, double proof would have been allowed in all cases where a debt had been contracted by two parties carrying on distinct trades with distinct capitals, and

[\*748] both of \*whom had become bankrupt. It would

have been immaterial whether the bankrupt parties were a firm and one of its members; or two firms, one of which included the other; or two firms having only one partner common to them both. It would also have been immaterial whether the creditor was or was not aware that one of the trades was in fact carried on by one or more of the persons who, with others, carried on the other trade. Unfortunately, however, the principle in question had been occasionally lost sight of, and the consequence was that the cases bearing upon the subject were in an unsatisfactory state, and extremely difficult to reconcile. (*y*)

In order, however, to remove the doubts and difficulties which had thus arisen, the following clause has been inserted in the Bankruptcy Act, 1883, schedule 2:

**Proof in respect of distinct contracts.**—18. If a debtor was at the date of the receiving order liable in respect of distinct contracts as a member of two or more distinct firms, or as a sole contractor, and also as member of a firm, the circumstance that the firms are in whole or in part composed of the same individuals, or that the sole contractor is also one of the joint contractors, shall not prevent proof in respect of the contracts against the properties respectively liable on the contracts.

This section, it will be observed, extends to all liabilities on distinct contracts which a bankrupt may have entered

(*x*) See *Ex parte Adam*, 1 V. & vol. ii, p. 1019 *et seq.*, and Gold-B. 496; *Ex parte Bigg*, 2 Rose, 37. *smid v. Cazenove*, 7 H. L. C. 785.

(*y*) See the 1st ed. of this treatise,

into, either as a member of two or more distinct firms, or as a sole contractor and also as a member of a firm. (z) The section applies although there may not be any distinct trades at all; and so long as there are distinct contracts between such persons as are mentioned in the section, double proof is now admissible. If, for example, the members of a firm give a joint and several promissory note, the holder will be entitled to prove as well against the joint estate as against the separate estates of the partners. (a) The old rule against double proof still remains; but it is now subject to so large a class of ex\*ceptions as to render the rule itself practically of little consequence.

Joint and several liabilities arising otherwise than by distinct contracts are, comparatively speaking, few in number. All frauds and breaches of trust are not within the act; but if a partner who is a trustee improperly lends trust money to the firm the *cestui que trust* can prove both against his separate estate and against the joint estate of the firm, for such a case is within the act. (b)

The act, however, only applies where there are two estates; it does not give a right of double proof against the same estate, although it may be the estate of a firm carrying on two businesses in different places. (bb)

*Thirdly, cases where a secured creditor may split his demand.*

**Position of joint and separate creditors who have securities.**—The rule as to election throws a just and separate creditor wholly upon one estate or wholly upon the other; whilst the exceptional rule as to double proof al-

(z) The fact that the contract is entered into by one of the parties as a partner need not appear from the contract itself. *Ex parte Stone*, 8 Ch. 914. joint and several covenants to pay rent, see *Re Corbett*, 14 Ch. D. 122.

(b) *Ex parte Sheppard*, 19 Q. B. D. 84. Compare *ante*, p. 745.

(a) *Simpson v. Henning*, L. R. 10 Q. B. 406; *Ex parte Honey*, 7 Ch. 178. As to the act of 1861, see *Ex parte Wilson*, 7 Ch. 490. As to (bb) *Banco de Portugal v. Waddell*, 5 App. Ca. 161, affirming 11 Ch. D. 317.

lows him to prove his whole debt against both estates at the same time. (c) There is, however, a middle course, and one which is open to a joint and separate creditor who has a security for his debt.

It has already been seen that under ordinary circumstances a creditor whose debts is secured is not allowed to prove for his debt without giving up his security; (d) but that this rule does not extend to a creditor who has the security not only of his bankrupt debtor, but also of somebody else; nor to a creditor of a firm having a separate security from one of the partners, nor to a creditor of one partner having a security from the firm. (e) This doctrine, coupled with that of election, puts a person who is a joint and separate creditor of one or more bankrupt partners, and who has a security for his debt, in this position:

[\*750] \*1. He may prove for his whole debt against the estate to which the security does not belong, and retain and make what he can of his security; (f) or,

2. He may give up his security; prove for the whole debt due on it (*i. e.*, the whole secured debt) against the estate to which the security belongs, and then prove for the residue of his debt against the other estate; thus in fact splitting his demand and proving for part against the joint estate, and for the residue against the separate estates of the partners, or *vice versa*.

The first case in which this splitting of debts was allowed was in *Ex parte Ladbroke*. (g) There the bankrupt firm was indebted to their bankers to the extent of 27,000%. The

(c) Of course he cannot obtain more than the whole amount due to him.

(d) *Ante*, p. 714. He may now have it valued and prove for the difference; but this does not affect the principle adverted to in the text.

(e) *Ante*, p. 715. And see *Ex parte Thornton*, 5 Jur. N. S. 212.

(f) As in *Ex parte Bate*, 3 Deac. 358; *Ex parte Smyth*, *id.* 597; *Ex parte Groom*, 2 *id.* 265. He can now, it is apprehended, prove against the other estate for the difference between his debt and the value of the security.

(g) 2 Gl. & J. 81.



sum of 18,000*l.*, part of this, was secured by the joint notes of the firm and by a mortgage of the separate property of one of the firm. The mortgage, however, extended not only to the 18,000*l.*, but to further advances, and contained a joint and several covenant by the bankrupt partners to pay the 18,000*l.* and further advances. The bankers were allowed to prove against the joint estate for the 18,000*l.*, and against the separate estate of the mortgagor for the residue of their debt, after deducting therefrom the sum obtained by a sale of the mortgaged property. (*h*) The report of the judgment is to the effect that the lord chancellor thought that the bankers were entitled to pursue the joint liability of the bankrupts on the promissory notes to the extent of those notes, and at the same time to proceed on the several covenants for the residue of the debt.

Again, in *Ex parte Hill* (*i*) a partner covenanted to pay 4,000*l.*, and assigned as a security 3,000*l.*, portion of his capital in the firm. A sum of 3,000*l.* was then placed in the books of \*the partnership to the credit of the [\*751] assignee, and the firm acknowledged themselves debtor to him for the amount. The firm became bankrupt, and although the creditor was not allowed double proof, viz., for 3,000*l.* against the joint estate of the firm, and for 4,000*l.* against the separate estate of the covenantor, yet he was allowed to prove for the 3,000*l.* against the joint estate, and for the remaining 1,000*l.* against the separate estate of the covenantor. (*k*)

#### SECTION V.—THE BANKRUPT'S ORDER OF DISCHARGE.

**Order of discharge.**—The law relating to the discharge of a bankrupt was recast by the Bankruptcy Act, 1883 (see §§ 28–31, and the Bankruptcy Rules of 1886, rr. 235–238).

(*h*) The mortgage security had been sold and a sum of money had been received by the bankers out of the proceeds of the sale, and this sum was deducted from the sum they sought to prove against the separate estate.  
(*i*) 3 M. & Ayr. 175, and 2 Deac. 249.  
(*k*) Some deductions were made,

An order of the court must be obtained before a bankrupt is discharged from his debts and liabilities. Moreover the court has a wide discretion conferred upon it, and may either grant or refuse the order, or suspend it for a time, or grant it subject to conditions as to future earnings or property. Further, if the bankrupt has been guilty of certain misdemeanors, (*l*) the court is forbidden to grant the order at all; and if he has conducted himself improperly in any of the ways specified in section 28 (3) or section 29 the court is bound either to refuse it or to suspend it, or to grant it subject to conditions as to future earnings or property. (*ll*)

**Effect of order of discharge.**—The effect of an order of discharge is to discharge the bankrupt from all provable debts and liabilities with some exceptions, (*m*) viz., crown debts, debts payable under Revenue Acts, or to sheriffs or other public officers, debts or liabilities incurred by [*\*752*] any fraud or fraudulent breach of trust to which *\*the* bankrupt was a party, (*n*) debts or liabilities whereof he has obtained forbearance by any fraud to which he was a party.

Whether an adjudication is joint or separate, all the creditors, as well joint as separate, are entitled to be heard against the granting of an order of discharge to the bankrupt. (*o*)

An absolute order of discharge entitles the bankrupt to all property subsequently acquired by him although the bankruptcy may not be closed. (*p*)

but the above statement is substantially correct with reference to the point for which the case is cited in the text.

(*l*) See § 28 (2) and § 31.

(*ll*) As to not keeping proper books, see *Re Mutton*, 19 Q. B. D. 102.

(*m*) Section 30 (1), as to debts in-

capable of valuation. See *Morgan v. Hardy*, 18 Q. B. D. 646.

(*n*) Not necessarily personally; by his agent or partner is enough. See *Cooper v. Pritchard*, 11 Q. B. D. 351; *Emma Silver Mining Co. v. Grant*, 17 Ch. D. 122.

(*o*) 46 and 47 Vict. ch. 52, § 28 (5), and Rules of 1886, r. 235.

(*p*) *Ebbs v. Boulnois*, 10 Ch. 479.

**Effect of bankrupt's order of discharge.**—An order of discharge operates as a discharge of the bankrupt from all debts provable under the bankruptcy, whether owing by him alone or by him jointly with others. (*q*)

But the discharge of one of several joint debtors does not discharge his co-debtors. (*r*) On the bankruptcy of one partner his order of discharge discharges him from all demands which his copartners may have had against him, and which were provable by them. A leading case on this head is *Wood v. Dodgson*; (*s*) there the defendant had covenanted with the plaintiffs, his copartners, on their retirement from the firm, to indemnify them against the partnership debts; the defendant became bankrupt, and afterwards the plaintiffs were compelled to pay debts of the firm. The defendant obtained his certificate, and this was held to be a bar to an action brought on the covenant by the plaintiffs; for although their demand accrued subsequently to the bankruptcy, it was provable therein by virtue of the enactment in the bankruptcy laws relating to proofs by sureties. The same point has been decided in other cases. (*t*)

**\*Joint orders of discharge.**—An order of dis- [\*753] charge granted to two or more persons protects each and all, so that the death of one does not affect the others. (*u*)

Where there is a joint adjudication against several partners, and some of them appeal from it, the court will not

(*q*) See 46 and 47 Vict. ch. 52, § 30; *Thompson v. Cohen*, L. R. 7 Q. B. 527; *Ex parte Hammond*, 16 Eq. 614.

(*r*) Section 30 (4); *Sleech's Case*, 1 Mer. 570, 571.

(*s*) 2 M. & S. 195. And see *contra*, *Dally v. Wolferston*, 3 Dowl. & Ry. 269, in which, however, *Wood v. Dodgson* was not cited. See as to staying a partner's certificate until the partnership accounts have been

taken, *Ex parte Hadley*, 1 Gl. & J. 193.

(*t*) *Ex parte Carpenter*, Mont. & MacAr. 1; *Affalo v. Fourdrinier*, 6 Bing. 306; *Wright v. Hunter*, 1 East, 20.

(*u*) See, as to advertising a joint certificate as a separate one, *Ex parte Carter*, 1 M. & A. 115; *Ex parte Cossart*, 1 Gl. & J. 248; *Ex parte Currie*, 10 Ves. 51.

on that account delay granting orders of discharge to the others. (*x*)

**Refusal of orders of discharge.**—For further information relating to the granting and refusal of orders of discharge the reader is referred to treatises on bankruptcy. Such matters illustrate no principle of the law of partnership, and are foreign, therefore, to the objects of this work. (*y*)

**Allowance to bankrupt partners.**—The same observation applies to the law and practice relating to the allowance made to a bankrupt out of his estate for the support of himself and family. (*z*) Upon this subject, however, the following rules, established under the old practice, may still be usefully noticed:

1. Unless a sufficient dividend is paid both to the joint and to the separate creditors of a bankrupt partner he will not be entitled to any allowance. (*a*)

2. If both classes of creditors are paid a sufficient dividend each partner will be entitled to an allowance, although he may have contributed little or nothing to the payment of the joint creditors. (*b*)

3. When one partner only is bankrupt, and he has paid his separate creditors in full, he is not entitled to an allowance out of the joint estate to the prejudice of the joint creditors. (*c*)

4. A bankrupt partner is not entitled to a double allowance, one in respect of the joint and the other in respect of his separate estate. He is entitled to only one allowance, [\*754] calculated on the amount of his separate estate, and of his share of the joint estate. (*d*)

(*x*) *Ex parte* Braggiotti, 2 De G. M. & G. 964.

(*y*) An order of discharge may apparently be void. See *Wagner v. Imbrie*, 6 Ex. 882; *Allcard v. Weeson*, 7 id. 753; *Courtivron v. Meunier*, 6 id. 74.

(*z*) See § 64.

(*a*) *Ex parte* Goodall, 2 Gl. & J. 281; *Ex parte* Farlow, 1 Rose, 421; *Ex parte* Powell, 1 Madd. 68.

(*b*) *Ex parte* Morris, Mon. 505; *Ex parte* Gibbs, id. 105.

(*c*) *Ex parte* Holmes, 3 V. & B. 137.

(*d*) *Ex parte* Lomas, 1 Mon. & A.

5. Where a separate adjudication is annulled in favor of a joint adjudication the bankrupt's right to an allowance is not prejudiced. (*e*)

**Position of undischarged bankrupt.**—An undischarged bankrupt is liable to be sued and otherwise proceeded against as if he were not a bankrupt; (*f*) but proceedings against him may be stayed either by the court in bankruptcy or by the court in which they are taken. (*g*)

The discharge of persons adjudicated bankrupt under the Bankruptcy Act, 1869, or any previous bankruptcy act, and the closure of bankruptcy proceedings commenced before the Bankruptcy Act of 1883 came into operation, are governed by the Bankruptcy Discharge and Closure Act, 1887. But there is nothing in it which specially relates to partners.

#### SECTION VI.—ARRANGEMENTS WITH CREDITORS.

**Arrangements with creditors.**—By the Bankruptcy Act, 1883, debtors, whether partners or not, are enabled, either before or after adjudication, to compound or make arrangements with their creditors respecting their debts and liabilities, and their release therefrom, and for the distribution, inspection, management and winding up of their estates; and the arrangements so made are binding not only on assenting, but also on all other creditors, provided certain conditions which are specified in the act are duly observed and the court approves of the scheme. (*h*) If the scheme is approved the receiving order is rescinded, and the \*bankrupt (if there is no trustee) is restored to his [\*755]

525. See, too, *Ex parte Bate*, 1 Bro. C. C. 453; *Ex parte Minchin*, Mont. & MacAr. 135.

(*e*) *Ex parte Llewellyn*, 3 M. D. & D. 573.

(*f*) This seems to follow from the fact that the Bank. Act, 1883, contains no provision to the contrary.

(*g*) 46 and 47 Vict. ch. 52, § 10 (2) and § 102 (2 and 4).

(*h*) 46 and 47 Vict. ch. 52, §§ 18 and 23, and Bank. Rules, 1886, rr. 195 to 216. See, as to the approval of the court, *Ex parte Reed* and *Bowen*, 17 Q. B. D. 244; *Ex parte Bischoffsheim*, 19 Q. B. D. 33, and *id.* 20 Q. B. D. 258.

property. (i) It is not, however, necessary further to advert to the law on this subject, for there is nothing in it peculiar to partners except as mentioned below.

**Several schemes.**—The Bankruptcy Rules, 1886, rules 266 and 267, are, however, important. They authorize in the case of partners several schemes, viz., a scheme for the joint liabilities of the firm, and separate schemes for the separate liabilities of its several members.

266. At the first meeting, or any adjournment thereof, the joint creditors and each set of separate creditors may severally entertain proposals for compositions or schemes of arrangement under section 18 of the act. (k) So far as circumstances will allow, a proposal entertained by joint creditors may be confirmed and approved in the prescribed manner, notwithstanding that the proposals or proposal of some or one of the debtors made to their or his separate creditors may not be entertained, confirmed and approved.

267. Where proposals for compositions or schemes are made by a firm, and by the partners therein individually, the proposal made to the joint creditors shall be considered and voted upon by them apart from every set of separate creditors; and the proposal made to each separate set of creditors shall be considered and voted upon by such separate set of creditors apart from all other creditors. Such proposals may vary in character and amount. Where a composition or scheme is approved, the receiving order shall be rescinded only so far as it relates to the estate, the creditors of which have confirmed the composition or scheme.

**Default in payment.**—If default is made in any payment under a composition or scheme the remedy is to apply to the court. (l)

The court has power to annul the composition or scheme if default is made in payment of any instalment due under it, or if it cannot proceed without injustice or undue delay, or if the approval of the court was obtained by fraud. (m)

**Effect of scheme.**—Whether the debtor is adjudged bankrupt or not, if a trustee is appointed the property of the

(i) Bank. Rules, 1886, r. 208.

(m) 46 and 47 Vict. ch. 52, § 18 (11)

(k) Or under § 23. See r. 216.

and § 23 (3). And see Bank. Rules,

(l) Bank. Rules, 1886, r. 211. And 1886, rr. 211 to 213; *Ex parte Moon*, see *Ex parte Godfrey*, 18 Q. B. D. 19 Q. B. D. 669.

debtor vests in him, and his title to it relates back as if he were a trustee in a bankruptcy. (*n*)

\*The debts provable are the same as in bank- [\*756] ruptcy; (*o*) and, unless otherwise agreed and approved, the rules respecting the payment of joint debts out of joint estate and of separate debts out of separate estate are also the same as in bankruptcy. (*o*)

A composition or scheme duly accepted and approved binds all the creditors so far as relates to their provable debts; (*p*) but it does not release any person who would not be released by an order of discharge. (*q*)

A discharge by joint creditors does not affect the separate creditors nor *vice versa*. (*r*)

After a complete discharge the debtor's after-acquired property belongs to him. (*s*)

By the Deeds of Arrangement Act, 1887, all instruments of arrangement with creditors, otherwise than in pursuance of the bankruptcy law, must be registered, and are declared void if not registered. See § 5. But the act has no provisions specially affecting partners, nor have the rules of 1888, which have been issued in order to carry it into effect.

(*n*) Id. § 18 (12 and 13) and § 23.

(*o*) 46 and 47 Vict. ch. 52, and Bank. Rules, 1886, r. 215.

(*p*) Id. § 18 (8) and § 23.

(*q*) Id. § 18 (15) and § 23.

(*r*) See *Meggy v. Imperial Discount Co.* 3 Q. B. D. 711.

(*s*) *Ex parte Wainwright*, 19 Ch. D. 140; *Ebbs v. Boulnois*, 10 Ch. 479.

## CHAPTER V.

### JOINT-STOCK COMPANIES IN THE UNITED STATES.<sup>1</sup>

#### 1. *Joint-stock companies existing independent of statutory regulation.*

Unincorporated joint-stock companies, as they exist in the United States, are, with the exception perhaps of those organized under the statutes of New York, merely copartnerships; and, as a general thing, subject to all the rules governing that branch of the law.<sup>2</sup> The shareholders are,

<sup>1</sup> In this chapter it is not proposed to treat of English joint-stock companies, that subject having been already sufficiently treated in professed works upon that subject, nor of joint-stock corporations, that subject belonging more properly in a work upon corporations, but of unincorporated joint-stock companies and of those companies organized under the New York statutes upon the subject, which, while possessing many, if not most, of the attributes of corporations, are not such to every intent and purpose. These companies, though organized in the state of New York, do business in many other states of the Union, so that the law concerning them has much more than a local importance.

<sup>2</sup> *Vigers v. Sainet*, 13 La. 300; *Tenney v. N. E. Protective Union*, 37 Vt. 64; *Manning v. Gasharie*, 27 Ind. 399; *Hedge's Appeal*, 63 Penn. St. 273; *Tappan v. Bailey*, 4 Met. 535; *Robbins v. Butler*, 24 Ill. 387; *Babb v. Reed*, 5 Rawle, 151; Bos-

ton, etc. *R. R. Co. v. Pearson*, 128 Mass. 445; *Clagett v. Kilbourne*, 1 Black. 346; *Lafond v. Deems*, 52 How. Pr. 41; *S. C. 1 Abb. N. C.* 318; *Wells v. Gates*, 18 Barb. 554; *Dennis v. Kennedy*, 19 Barb. 517; *Townsend v. Goewey*, 10 Wend. 424, 428; *Cross v. Jackson*, 5 Hill, 478; *Williams v. Bank of Mich.* 7 Wend. 539; *In re Fry*, *Treas. etc.* 4 Phila. 129; *Kramer v. Arthurs*, 7 Penn. St. 165.

"Mere partnerships as to every person except their own stockholders, they never having been legally incorporated. Whatever name such a company may assume and use in the transaction of its business, it is a partnership, and not a corporate designation." *Williams v. Bank of Mich.* 7 Wend. 539, 542, per Walworth, Chancellor. See, also, *Skinner v. Dayton*, 19 John. 537; *Thomas v. Ellmaker*, 1 Pars. Sel. Eq. Cas. 98; *Butterfield v. Beardsley*, 28 Mich. 412.

See, however, *Livingston v. Lynch*, 4 John. Ch. 573, 592, where



therefore, each personally liable for all debts of the company, no matter what the private arrangements among

it was said by Chancellor Kent that the evident character of the members of the company in that case was that of tenants in common, in which each had a distinct though undivided interest in the establishment, and an entire dominion over his own share or proportion of the property, but without any right or power to bind the interest or regulate the enjoyment of the property of the other members. This position of Chancellor Kent was approved in 1852 by Taggart, P. J., in *Irvine v. Forbes*, 11 Barb. 587.

An association was formed by an instrument subscribed and sealed by the parties to it, by which each person was to have one share for every \$500 subscribed. The capital was to consist of eighty shares, transferable certificates of which were to be issued. The constitution provided for a choice of officers, and that the president and directors should "have the exclusive direction and arrangement of all the concerns of the company and treasury department." *Held*, that thus constituted it became rather a joint-stock company than a proper copartnership. If they had been copartners, each individual could have disposed of the whole property, incurred liabilities and made purchases. In this association, no one, nor even all the members, not being directors, could have done this, and the law applicable to partnership proper does not decide the rights of the members. *Cox v. Bodfish*, 35 Me. 306, citing *Livingston v. Lynch*, 4

*Johns. Ch.* 573; *Irvine v. Forbes*, 11 Barb. 588.

Certain owners in severalty in a tract of land laid the same off in a town site and authorized the company to sell the lots. There was no conveyance to the company of the interests of the several owners, but each shareholder received his *quota* of stock, and the articles of association provided that deeds for lots sold should be executed by the president and secretary. *Held*, (1) that the organization was a joint-stock company; (2) that as each partner had authorized a conveyance by the president and secretary, his title passed by such deed. *Batty v. Adams County*, 16 Neb. 44.

A partnership was formed under a declaration of trust, by the terms of which no member had any control over the business except through a board of directors. A debt was incurred by the partnership, which one member paid after he and the other partners were sued by the creditors. *Held*, that the cause of action which such member had against the other members for contribution did not accrue before payment. *Phillips v. Blatchford*, 137 Mass. 510.

Where a trust is created by deed which contemplates the purchase of municipal bonds (the legal title to which is vested in the trustees) by a fund raised by the sale of certificates payable to bearer, which entitles holder to participate in the income and in the distribution of securities by a drawing in a mode prescribed by the deed, the relation of partners does not exist between

themselves may be;<sup>1</sup> and this notwithstanding they attempt to arrogate to themselves the attributes of corporations by

the certificate holders. *Johnson v. Lewis*, 2 McCrary, C. Ct. 479; S. C. 6 Fed. Rep. 27.

The by-laws and usages of an unincorporated company are analogous to the terms of the articles of copartnership, and in buying into the partnership the purchaser of stock is bound to know the rules and regulations which govern it. *Logan v. McNaugher*, 88 Pa. St. 103.

A member of such a joint-stock

company who signed the subscription for stock becomes a partner and liable for the debts of the company, although he did not sign the articles of association, never attended any meeting of the association, had no knowledge of the amount of the subscriptions or of the business of the association, and was not known to the creditor to be a partner when the debt was incurred, and although no certificates of stock were issued to any

<sup>1</sup> *Robbins v. Butler*, 24 Ill. 387; *Hess v. Werts*, 4 S. & R. 356; *Vigers v. Sainet*, 13 La. 300; *Tenney v. N. E. Protective Union*, 37 Vt. 64; *Manning v. Gasharie*, 27 Ind. 399; *Hedges' Appeal*, 63 Pa. St. 373; *Tappan v. Bailey*, 4 Met. 535; *Lewis v. Tilton*, 64 Ia. 220; *Cutler v. Thomas*, 25 Vt. 73. See, also, *Skinner v. Dayton*, 19 John. 537; *Thomas v. Ellmaker*, 1 Pars. Sel. Eq. Cas. 98.

Where the articles of association provided that persons having dealings with the company should not have recourse for their debts against the separate property of its members, but should be considered as having given credit to their *joint funds solely*, and that the trustees or agents of the company should have no authority to bind it by any contract, unless it contained a restriction to that effect, *held*, that plaintiff, having done work for the company under a contract by parol and attended with no such restriction, might maintain an action, not upon the contract itself, but upon the *quan-*

*tum meruit*, either against the agents as having made themselves personally liable, or against the individuals composing the association, on the ground that they had received the benefit of the plaintiff's labor. *Sullivan v. Campbell*, 2 Hall, 271.

The shareholders in a private joint-stock company are each personally liable for all the debts of the company, and cannot transfer this liability to others, except in the way pointed out in the articles of association. *Robbins v. Butler*, 24 Ill. 387.

A voluntary unincorporated association for manufacturing purposes provided in their articles of agreement that each stockholder should pay a certain sum per share at the time of subscribing, and all subsequent assessments, or forfeit his stock. *Held*, that this was a partnership, and that the stockholders could not escape liability for debts contracted within the scope of the partnership business by a forfeiture of their stock. *Skinner v. Dayton*, 19 Johns. 513.

doing business under a corporate name, and appointing certain of their members to act as directors.<sup>1</sup> The fact

one. *Boston & Albany Railroad Co. v. Pearson*, 128 Mass. 445.

Persons associating themselves together under articles to purchase property and to carry on a manufacturing business, if their organization be so defective as to come short of creating a corporation within the statute, become in legal effect partners. *Whipple v. Parker*, 29 Mich. 370. See, also, *Coleman v. Coleman*, 78 Ind. 341; *Richardson v. Potts*, 71 Neb. 128.

The estate of a shareholder in a partnership with capital stock divided into transferable shares is liable to contribute to the other partners for the payment of debts incurred after his decease and before his executor had done any act by which he became a partner in the testator's place. *Phillips v. Blatchford*, 137 Mass. 510.

Under vol. 1, Pr. Laws, Ill. 1869, p. 194, the liability of the stockholders of a private bank on contracts of the bank to the extent of the stock was held to be the same as that of partners. *Fleischer v. Rentchler*, 17 Bradw. 403; *S. P., Buchanan v. Meisser*, 105 Ill. 638; *Thompson v. Meisser*, 108 Ill. 359.

Only those members of a voluntary unincorporated association, such as a Masonic lodge, can be held liable for the debts incurred for the benefit of the association who authorize the incurring of the debt or ratify the same. *Ferris v. Thaw*, 72 Mo. 446; *Ash v. Give*, 97

Pa. St. 493; *Ray v. Powers*, 134 Mass. 22; *Volger v. Ray*, 131 Mass. 439. See, also, *Reding v. Anderson*, 34 N. W. Rep. (Ia.) 300; *Heath v. Goslin*, 80 Mo. 310; *S. C. 50 Am. Rep. 505*; *Davis v. Holden*, 10 Atl. Rep. 515. See *ante*, CLUBS.

As to the evidence of authority of one member to bind the association, see *Newell v. Borden*, 128 Mass. 31.

One dealing with a voluntary unincorporated association as a corporation and not trusting to the credit of a member cannot hold him individually liable. *Stafford Bank v. Palmer*, 47 Conn. 443. See, however, *Doyle v. Mizner*, 42 Mich. 332.

A deed to a voluntary unincorporated association has been held to vest the title in the members as tenants in common. *Byam v. Bickford*, 140 Mass. 31.

By the articles of a voluntary joint-stock association, seven trustees were to be elected, and any vacancy, occurring by death, resignation or otherwise, was to be filled at the annual meeting. After the trustees were elected, and acted as such, A., one of the seven, resigned. Notice of a special meeting for an election of trustees was given, and a meeting held, at which B., one of the seven, voted for seven trustees, and seven were chosen, displacing B. The trustees elected excluded B. from the management of the affairs of the com-

<sup>1</sup> *Hess v. Werts*, 4 S. & R. 356; (cited *supra* in note); *McGreary v. Williams v. Bank of Mich.* 7 Wend. 539, 542, per Walworth, Chancellor

that the members call themselves stockholders and the firm an association, and that the number of members is considerable, makes not the slightest difference as to the real nature of the association.<sup>1</sup> In all actions at law by and against such unincorporated associations, all the members must be made parties to the same, as in the case of an ordinary partnership. No action can be maintained by or against the association in the character of a society possessing corporate rights.<sup>2</sup> Nor can such an association sue in the name of any officer of the association or in the name of their trustees.<sup>3</sup> Nor can an action at law be maintained by one member against another which involves an examination of the partnership accounts.<sup>4</sup> Nor can the officers maintain replevin against the members for the common property.<sup>5</sup> The directors of such an unincorporated joint-stock company stand in the relation of trustees to the stockholders, and any gain they may reap in the discharge of their official duties, and while they continue to be in-

pany, whereupon he brought a bill for an account and dissolution of the partnership. *Held*, that by acting at the election, and voting for seven trustees, B. had not resigned, and that he was still a trustee. *Berry v. Cross*, 3 Sandf. Ch. 1.

By the articles of agreement under which an unincorporated manufacturing association went into operation, it was declared to be the duty of the president and directors to appoint a general agent to transact the business of the firm, under the direction of the president and directors. *Held*, that the president and directors might transact the business of the company without the appointment of an agent. *Skinner v. Dayton*, 19 Johns. 513.

<sup>1</sup> *Wells v. Gates*, 18 Barb. 554;

*Dennis v. Kennedy*, 19 Barb. 516.

<sup>2</sup> *Pipe v. Bateman*, 1 Iowa, 369; *McGreary v. Chandler*, 58 Me. 537; *Williams v. Bank of Mich.* 7 Wend. 542, per Walworth, Ch.

As to when suit must, under section 1919 of the New York code, be first brought against the president or treasurer, see *Flagg v. Swift*, 25 Hun, 623.

<sup>3</sup> *Niven v. Spickerman*, 12 John. 401. See, also, *McGreary v. Chandler*, 58 Me. 537.

<sup>4</sup> *Bullard v. Kinney*, 10 Cal. 60.

No action can be maintained by the treasurer of an association, not incorporated, against one upon his promise in writing to pay money as a subscription, not to any person by name, but "to the treasurer" of the association alone. *Ewing v. Medlock*, 5 Port. 82.

<sup>5</sup> *Hewitt v. Hatch*, 57 Vt. 16.

vested with the fiduciary capacities, inures to the benefit of the *cestis que trustent*.<sup>1</sup>

The principal difference between unincorporated joint-stock associations and partnerships relates to the effect of a transfer of a member's interest in the association. In the case of a partnership such a transfer, in the absence of an agreement to the contrary, as we have already seen, works a dissolution, as does likewise the death of a partner. In the case of joint-stock associations there is usually no *delectus personæ*, and a transfer by a member of his shares or the death of a member does not dissolve the association.<sup>2</sup>

<sup>1</sup> *In re Fry*, 4 Phila. 129.

Directors of an unincorporated joint-stock association or partnership are not liable to the stockholders for losses caused by their mistakes of judgment honestly made, where they acted without consideration and appeared to have exercised their best judgment for the general benefit of the concern, without seeking to benefit themselves to the injury of their copartners. *Addam's Appeal*, 15 Weekly Not. Cas. 230.

<sup>2</sup> *Tyrrell v. Washburn*, 6 Allen, 466; *Phillips v. Blatchford*, 137 Mass. 510; *Tenney v. N. E. Protective Union*, 37 Vt. 64. See, also, *Troy Iron & Nail Factory v. Corning*, 45 Barb. 231.

If by the articles of a trading association it is apparent that it was designed to consist of many members, who might from time to time cease to be interested in the concern by voluntary withdrawal or death, and that the same business should be continued by those who should remain, and by such as might be added to their number under the terms of the articles, the death of one of them does not

dissolve the association, and thus relieve others from liability to contribute for debts subsequently contracted without their knowledge or consent. *Tyrrell v. Washburn*, *supra*.

In such an association, as between retiring members and creditors of the company, such retiring members remain liable for all existing debts; and they may be liable for subsequent debts to creditors who had knowledge of their membership, but had no notice of their withdrawal. As among themselves, however, their rights and liabilities may be modified by special agreement. *Tyrrell v. Washburn*, *supra*.

The articles of an unincorporated joint-stock company composed of three persons provided in substance that either of the associates might sell any of his shares of stock, but that before selling to any other person he should offer them to the association, and that no sale should give the purchaser any control in the business nor any interest in the profits until scrip should be issued to him by the other associates. *Held*, that a sale of shares without

As respects the forfeiture by a member of his interest in the company, the provision in the articles of agreement of

an offer to the association was valid, but did not constitute the purchaser a partner nor work a dissolution; but that the purchaser, being registered and getting his certificate, could demand and receive dividends declared to his vendor, on a power of attorney from him. *Harper v. Raymond*, 3 Bosw. 29; S. C. 7 Abb. Pr. 142.

The implied promise of one holding moneys for a joint-stock association, in which the interests of the members are represented by certificates transferable at will, must be understood to be to make payment to those who are associates when suit is brought; and where one of the plaintiffs, who is a member when suit is brought, holds by assignment from one of the original associates, it is not necessary that the declaration mention the assignment, but it may count as upon an original promise to all the plaintiffs. *Willson v. Owen*, 30 Mich. 474.

The distinctive feature of a mining partnership is the absence of the *delectus personarum* which characterizes ordinary partnership. Its membership is changeable and uncertain. Only the parties are affected by decrees and judgments against it. All persons dealing with it are bound to take notice of its peculiarities. *Lamar v. Hale*, 79 Va. 147; *Santa Clara Mining Ass'n v. Quicksilver Mining Co.* 17 Fed. Rep. 657.

There is no relation of trust or confidence between mining partners which is violated by the sale and assignment by one partner of

his share to one or more of his associates without the knowledge of the others. *Bissell v. Foss*, 114 U. S. 252.

A mining partnership exists where the several owners of a mine co-operate in the working of the mine, and may exist as well where the parties have an interest merely in the working of the mine, or in carrying on mining operations, as where they own the mine itself. *Manville v. Parks*, 7 Col. 128; *Higgins v. Armstrong*, 9 Col. 38.

Persons jointly conducting a mining venture are partners, though there is no agreement of partnership. *Snyder v. Burnham*, 77 Mo. 52.

A contract between three persons to operate a mining property as a company creates a partnership between such persons from the date thereof, and makes each of them liable for the debts contracted in prosecuting the enterprise, notwithstanding the contract provides that there shall be no division of profits until two of the parties are reimbursed therefrom the money expended in the purchase of two-thirds of the property from the other one and the cost of improving the same. *Bybee v. Hawkett*, 8 Sawyer, C. Ct. 176; S. C. 12 Fed. Rep. 649.

Such partnership is governed by many of the rules governing ordinary partnerships, but differing therefrom in many important particulars. *Higgins v. Armstrong*, 9 Col. 38.

The powers of members and managers of mining partnerships

a private joint-stock company that upon default by a stockholder in payment of assessments all his shares, right and

are limited to the performance of such acts in the name of the firm as may be necessary to the transaction of the business or which are usual in like concerns. *Charles v. Eshleman*, 5 Col. 107.

Members of a mining partnership, although not authorized to bind the company by a promissory note or for money borrowed to carry on the business, yet have authority to bind each other by dealings on credit for the purpose of working the mines if it appears to be necessary or usual in the management and course of working the mines. *Manville v. Parks*, 7 Col. 128; *Higgins v. Armstrong*, 9 Col. 38.

In mining partnerships there is usually no *delectus personæ*, and as a consequence such a partnership is not dissolved by the death of a partner, or a sale of an interest by a partner to a stranger. *Kahn v. Smelting Co.* 102 U. S. 641; *Taylor v. Castle*, 42 Cal. 367; *Jones v. Clark*, 42 Cal. 180; *Bainbridge on Mines*, 425; *Charles v. Eshleman*, 5 Col. 107; *Lamar v. Hale*, 79 Va. 147. See, also, *Hamilton v. Hamilton*, 1 Russ. Eq. (Nov. S.) 78.

A surviving partner has in such case no right to take control of the property as survivor, this right only applying where the *delectus personæ* exists. *Jones v. Clark*, 42 Cal. 180.

A stranger by his purchase of shares in such a partnership presumptively becomes a partner, though he takes no part in the management of the partnership

affairs, and does not hold himself out to the world as a partner. *Taylor v. Castle*, 42 Cal. 367.

If a promissory note is binding on a mining partnership as a valid contract such partnership continues liable, at least to the extent of the partnership assets, though some members of the company have parted with their interests—the new members having purchased with knowledge subject to the payment of partnership debts. *Jones v. Clark*, 42 Cal. 180.

The recognized and established usage on the part of such a firm should be taken as a part of the contract of partnership. *Taylor v. Castle*, 42 Cal. 367. See, also, *Jones v. Clark*, *supra*.

So unincorporated ditch companies organized for the sale of water to miners and others, the stock of which is bought and sold at the pleasure of the owners without consulting the co-owners, differ from ordinary commercial partnerships. Some of the incidents of a partnership pertain to such companies, and some of mere tenancies in common likewise pertain to them. *McConnell v. Denver*, 35 Cal. 365. A member of such a company has no general authority by virtue of his membership to bind the company by his contracts. *McConnell v. Denver*, *supra*.

Where, however, by the articles of agreement of an incorporated association for the regulation of their business affairs it was stipulated that the capital stock should be divided into shares; that the

interest in the association and its property shall be forfeited, does not authorize the trustees by a naked declaration to make a forfeiture against which a court of equity will not grant relief.<sup>1</sup>

2. *Joint-stock companies organized under, or regulated by, statutes.*<sup>2</sup>

The principal legislation upon the subject of joint-stock companies not possessing all the attributes of corporations is to be found in the statute books of New York; and as the companies organized under the act of 1849, and the subsequent acts amendatory thereof, do business in many other states of the Union, these statutes have been thought of

shares should be transferable; and that trustees should be appointed to manage the affairs, in whom all the property should vest in trust; and in accordance with those regulations trustees were appointed, who made purchases of real and personal property, and proceeded to the transaction of business; and shares were from time to time transferred until twenty-nine-fortieths of them were held by one person, *held*, that a sale by him, not of his shares, but of twenty-nine-fortieths of all the land and property which had belonged to the company, was a dissolution of the association; and that the persons who owned the shares at the time of the dissolution were entitled, according to the number of their shares, to all the avails and assets of the company, and were liable to contribute in the same proportion to all the debts of the company. *Smith v. Virgin*, 33 Me. 148.

<sup>1</sup> *Walker v. Ogden*, 1 Biss. 287.

An incorporated joint-stock association was formed to operate by

trade and labor in a distant state. Its constitution divided the stock into shares of \$500, and provided that each member, by subscribing to render his personal labor, should be entitled to another share, but that desertion from the service should forfeit all his interest in the association. C. became a stockholder, but did not subscribe for personal services. He, however, authorized W., as his substitute, to labor and vote as representing his share abroad, and W. was permitted to vote and act accordingly, though he had never subscribed for stock. W. afterwards deserted the employment. *Held*, that the substitution conferred upon W. no share in the stock, and that C.'s interest in the association was not forfeited by the desertion, although such forfeiture had been declared by the unanimous vote of the company. *Cox v. Bodfish*, 35 Me. 302.

<sup>2</sup> Not, however, including those possessing all the attributes of corporations. See the introductory note at the beginning of this chapter.



sufficient importance to warrant their being printed in a note.<sup>1</sup>

<sup>1</sup> The act of 1849 (Laws of New York, 1849, ch. 258, p. 389), "in relation to suits by and against joint-stock companies and associations," is as follows:

"§ 1. Any joint-stock company or association, consisting of seven or more shareholders or associates, may sue and be sued, in the name of the president or treasurer, for the time being, of such joint-stock company or association, and all suits and proceedings so prosecuted by or against such joint-stock company or association, and the service of all process or papers in such suit and proceedings on the president or treasurer, for the time being, of such joint-stock company or association, shall have the same force and effect as regards the joint rights, property and effects of such joint-stock company or association, as if such suits and proceedings were prosecuted in the names of all the shareholders or associates in the manner now provided by law.

"§ 2. No suit so commenced shall abate by reason of the death, removal or resignation of such president or treasurer of such joint-stock company or association, or the death or legal incapacity of any shareholder or associate during the pendency of such suit; but the same may be continued by or against the successor of the officer in whose name such suit shall have been commenced.

"§ 3. The president or treasurer of any such joint-stock company or association shall not be liable in his own person or property by reason of any suit prosecuted, as above

provided, by or against him, as the nominal plaintiff or defendant therein, provided that such president or treasurer shall not be exempted from any liability to which he may be otherwise legally subject as a stockholder or shareholder in such joint-stock company or association.

"§ 4. Nothing herein contained shall be construed to deprive any plaintiff of the right, after judgment shall be obtained against any joint-stock company or association, as above provided, from suing any or all of the shareholders or associates therein, individually, as now provided by law, or of the right to proceed, in the first instance, against the persons constituting any such joint-stock company or association, in the manner now provided by law; but if it shall appear to any court in which any suit shall be prosecuted otherwise than is provided in the first section of this act that the same is so prosecuted for the purpose of vexatiously and oppressively enhancing costs, such court shall not allow any more costs to be taxed and recovered in such suit than would be taxable and recoverable in case such suit was prosecuted in the manner provided in the first section of this act.

"§ 5. Nothing herein contained shall be construed to confer on the joint-stock companies or associations mentioned in the first section of this act any of the rights or privileges of corporations, except as herein specially provided."

In 1851 (Laws of 1851, ch. 455,

With respect to the nature of the associations existing under these statutes, notwithstanding the fact that a con-

p. 838) the act of 1849 was amended as follows:

"§ 1. The act entitled," etc., . . . "is hereby extended to any company or association composed of not less than seven persons, who are owners of or have an interest in any property, right of action or demand, jointly or in common, or who may be liable to an action on account of such ownership or interest; and the suits and proceedings authorized by said act may be brought and maintained in the manner therein provided, as well for any cause of action heretofore existing as for any that may hereafter accrue."

In 1853 (Laws of 1853, ch. 156, p. 283) the fourth section of the said act of 1849 was amended to read as follows:

"§ 4. Suits against any such joint-stock company or association, in the first instance, shall be prosecuted in the manner provided in the first section of the said act; but after judgment shall be obtained against any such joint-stock company or association, as above provided, and execution thereon shall be returned unsatisfied in whole or in part, suits may be brought against any or all of the shareholders or associates, individually, as now provided by law; but no more than one suit shall be brought and maintained against said shareholders at any one time, nor until the same shall have been determined, and execution issued and returned, unsatisfied in whole or in part. No death, removal, resignation of officers or shareholders, or sale or

transfer of stock, shall work a dissolution of any such joint-stock company or association as against the parties suing or being sued by such company, as herein provided, or as against any creditor or person having any demand against such company at the time of any such death, removal, resignation, sale or transfer."

In 1854 (Laws of 1854, ch. 245, p. 553) the previous acts upon the subject were amended and added to as follows:

"§ 1. Whenever, in pursuance of its articles of association, the property of any joint-stock association is represented by shares of stock, it may be lawful for said association to provide by their articles of association that the death of any stockholder, or the assignment of his stock, shall not work a dissolution of the association, but it shall continue as before; nor shall such company be dissolved, except by judgment of a court for fraud in its management or other good cause to such court shown, or in pursuance of its articles of association.

"§ 2. Said association may also, by said articles of association, provide that the shareholders may devolve upon any three or more of the partners the sole management of their business.

"§ 3. This act shall in no way be construed to give said associations any rights and privileges as corporations."

In 1867 (Laws of 1867, vol. 1, ch. 289, p. 576) an act was passed to authorize joint-stock companies

siderable number of cases seem to regard them as nothing more than partnerships, and governed by the same rules as partnerships, except so far as the statute has changed such rules,<sup>1</sup> as, for example, respecting the method of suing and being sued, other and more authoritative and well considered cases regard them substantially as corporations. With respect to the nature of these associations, Barnard, J., speaking in 1867 of joint-stock companies organized under said statutes, said: "They are organized, not as simple partnerships, but with written articles of association framed under and with reference to the statute laws on the subject. The first act was passed in the year 1849. It was amended in the year 1851, and again in 1854. A further act, passed at the session of 1867, authorized these companies to hold real estate in perpetual succession. By an examination of all

and associations to purchase, hold and convey real estate as follows:

"SECTION 1. It shall be lawful for any joint-stock company or association to purchase, hold and convey real estate for the following purposes:

"1. Such as shall be necessary for its immediate accommodation in the convenient transaction of its business; or

"2. Such as shall be mortgaged to it in good faith, by way of security for loans made by or moneys due to such joint-stock company or association; or

"3. Such as it shall purchase at sales under judgments, decrees or mortgages held by such joint-stock company or association.

"The said joint-stock company or association shall not purchase, hold or convey real estate in any other case or for any other purpose; and all conveyances of such real estate shall be made to the president of such joint-stock company

or association as such president, and who, and his successors, from time to time, may sell, assign and convey the same, free from any claim thereon against any of the shareholders, or any person claiming under them, or any or either of them."

The provisions of the constitution of New York touching the question are as follows:

ART. 8, § 1. "Corporations may be formed under general laws."

Id. § 3. "The term corporations, as used in this article, shall be construed to include all associations and joint-stock companies having any of the powers or privileges of corporations not possessed by individuals or partnerships."

<sup>1</sup> See *Lafond v. Deems*, 52 How. Pr. 41; *S. C. 1 Abb. N. C. 318*; *Welch v. Gates*, 18 Barb. 554; *Dennis v. Kennedy*, 19 Barb. 517; *Moore v. Brink*, 4 Hun, 402; *S. C. 6 N. Y. Supreme Ct. 22*.

these statutes it will be found that joint-stock companies possess the following qualities or attributes of corporations: 1. They can, like corporations, sue and be sued in a single or collective name, to wit, the name of their president or treasurer. 2. Their property or capital is represented in shares and certificates of stock, differing in no respect from shares and stock certificates in corporations. 3. The death of a member, his insolvency, or the sale or transfer of his interest, is not a dissolution of the company. 4. They have perpetual succession, or what is sometimes called the immortality of corporations. 5. They can take and hold real and personal estate in a collective capacity and in perpetual succession. These are all attributes of a corporation, and if we look into the books for elementary definitions, we shall find that corporations have no other attributes, except the technical one of a common seal, to distinguish them from common-law partnership. On the other hand simple partnerships have none of the attributes or qualities here mentioned. Mere names are of but little importance. Looking at the substance and nature of things, it is plain that in respect to the absence of a common seal merely the joint-stock associations are like partnerships. In the other and vastly more material respects mentioned they are like corporations, although they are not declared to be such by the legislative acts referred to." . . . "As to personal and individual liability, that is an incident both of partnerships and corporations, uniform and invariable in the one case, subject entirely to the legislative will in the other."<sup>1</sup>

So in *Westcott v. Fargo*<sup>2</sup> it was held that the president or treasurer of a joint-stock company or association consisting of seven or more members is, under the provisions of the act of 1849, amended by the act of 1853, chapter 153, and under the provisions of the constitution (art. 8), relative to

<sup>1</sup> *Waterbury v. Merchants' Union Express Co.* 50 Barb. 157; S. C. 3 Abb. Pr. N. S. 163.

<sup>2</sup> 61 N. Y. 542.

corporations, to be regarded for the purposes of an action against the company substantially as a corporation sole.

So, in *Sandford v. Supervisors of New York*,<sup>1</sup> it was held that joint-stock associations organized under the laws of 1849, chapter 258, and of 1854, chapter 245, are corporations by virtue of the constitution, notwithstanding the proviso of the act of 1854 that said "act shall in no court be construed to give said associations any rights and privileges as corporations," and that they are therefore liable to taxation on their capital.

The question has arisen and been decided in several cases as to what is the *status* in other states of a joint-stock association organized under the statutes above referred to, and a diversity of opinion prevails upon the subject. In the recent case of *Fargo, Pres't of the Am. Exp. Co., v. Louisville, N. A. & C. R'y Co.*,<sup>2</sup> decided May 3, 1881, in the United States circuit court for the district of Indiana, it was held that a New York joint-stock company, possessing the right by the law under which it was organized to sue and be sued in the name of its president or treasurer, was a citizen of the state of New York in the same sense that corporations are citizens of the states under whose laws they are organized; and that such joint-stock company might by the comity of states sue and be sued in the name of such officer in the federal courts as a citizen of New York, even though shareholders of such joint-stock company were citizens of the same state as the adverse party to the suit. The court considered that, in determining what

<sup>1</sup> 15 How. Pr. 172.

See, however, *Bell v. Streeter*, N. Y. Trans., 26 Jan. 1872, p. 6. See the constitutional provision above referred to, quoted *supra* in the note containing the New York statutes.

<sup>2</sup> 13 Chicago Legal News, 277. See, also, *Habicht v. Pemberton*, 4 Sandf. 658, per Duer, J.

When an association of persons assume a name which implies a corporate body, and exercise corporate powers, they will not be heard to deny that they are a corporation. *United States Express Co. v. Bedbury*, 34 Ill. 459; *Clarkson v. E. & N. S. Dispatch*, 6 Bradwell, 284.

such joint-stock companies are, regard was to be had to their essential attributes rather than to any mere name by which they might be known; and that if the essential franchises of a corporation were conferred upon a joint-stock company, it was none the less a corporation because the statute called it something else, or even designated it as an "unincorporated association."

In *Cutler v. Thomas*<sup>1</sup> it was said that the liability of individual members of an unincorporated joint-stock company formed in Canada, growing out of the association, must be judged of by the law of Canada, where the association was formed, and where their place of business was, though a bill of exchange drawn by them might be governed by the laws of the place where it is made payable.

On the other hand, in Massachusetts it is held that the statutes in question are local in their operation as regards remedies for debt against the company; that in Massachusetts such a company is a mere partnership, and that the members may be sued in Massachusetts in the first instance as partners for such a debt, notwithstanding the provision of the New York statute that no suit shall be maintained on the demand against the individual members until judgment has been rendered against the company in the name of the president or treasurer, and execution thereon returned unsatisfied.<sup>2</sup>

As to the method of organization, and the associations to which the statute applies, the act of 1849 did not, it seems, until extended by the act of 1851, apply to associations wherein the members were not shareholders or stockholders.<sup>3</sup> It is not, however, necessary to the existence of an association under the act of 1849 that there should be any subscription in writing by its members, and, although to endure longer than one year, it is not within the statute of

<sup>1</sup> 25 Vt. 73.

<sup>3</sup> *Kingsland v. Braisted*, 2 Lans.

<sup>2</sup> *Taft v. Ward*, 106 Mass. 518; 17.

S. C. 111 id. 518; *Gott v. Dinsmore*,  
111 id. 45.

frauds. The statute requires no greater formalities in that respect for its formation than for the formation of an ordinary partnership.<sup>1</sup> It is not necessary that certificates of stock or scrip should be issued, or that a person should be formally declared a stockholder in order to entitle him to the rights and make him liable to the duties of membership; in order to become a proprietor it is only necessary that he should subscribe the articles of association.<sup>2</sup>

A social club, though without formal constitution and by-laws, and without purposes of profit or pecuniary advantage, may be held liable, in an action under the statute, as a joint-stock association, or association of seven or more persons having a common interest.<sup>3</sup>

The rights and capacities of joint-stock companies organized under said statutes, and the rights and liabilities of their members, have already been considered to some extent. As to the necessary parties to actions by and against such associations, it is not necessary under the statute that the individuals comprising the membership of such a company consisting of more than seven associates should be made parties to an action by or against it. The action is well brought by or against the president or treasurer of the association, named as plaintiff or defendant.<sup>4</sup> An action

<sup>1</sup> *Nat. Bank of Schuylerville v. Van Derwerker*, 74 N. Y. 234.

<sup>2</sup> *Dennis v. Kennedy*, 19 Barb. 517. See, also, *Wells v. Gates*, 18 Barb. 554.

Prior to the passage of the act of 1849 it was held that persons who subscribe for shares in a joint-stock company and pay deposits, but do not comply with the full conditions of the association, and never become entitled to profits, are not liable for debts unless they are active in contracting them or hold themselves out as partners. *West Point Foundry Ass'n v. Brown*, 3 Edw. Ch. 284.

<sup>3</sup> *Ebbinghausen v. Worth Club*, 4 Abb. N. C. 300. *Contra*, *Park v. Simmons*, 10 Hun, 128.

<sup>4</sup> *Olery v. Brown*, 51 How. Pr. 92; *National Bank of Schuylerville v. Van Derwerker*, 74 N. Y. 234; *Tibbetts v. Blood*, 21 Barb. 650; *De Witt v. Chandler*, 11 Abb. Pr. 459.

A member of a voluntary unincorporated association for purposes of pleasure cannot maintain an action in his own name upon a contract made with the association, nor has he an interest therein which he can so transfer that his assignee can maintain an action against the

against the president, secretary and treasurer is improperly brought.<sup>1</sup> In a complaint in an action by an officer of a joint-stock company, the allegation that the company is a joint-stock company or association consisting of more than seven shareholders or associates is, under the act of 1849, a material and issuable allegation.<sup>2</sup> The complaint in such action need not, however, state the names of seven of the associates. It is sufficient if it avers that the association

contractor with the association. Nor can one member maintain an action at law in behalf of the association against another member upon any agreement made with the association. *McMahon v. Rauhr*, 47 N. Y. 67.

The statute of Connecticut (Gen. Stat. tit. 1, § 65) provides that any number of persons associated as a voluntary association, not having corporate powers, but having some distinguishing name, may be sued by the name by which the association is known. *Held*, that a military company formed by voluntary enlistment under the laws of the state, and known as "Co. G, Second Regiment, Conn. National Guard," was a voluntary association under the statute, and might be sued by that name. *Fox v. Narramore*, 36 Conn. 376.

Where such a company had occupied certain leased premises as an armory, and the commanding officer had received from the state a sum of money for the purpose of paying the rent of such premises, which money had not been paid to the lessor, but had been applied for the benefit of the company in another manner, it was *held* that the company was liable to the lessor, in an action for money had and received, for the money so received

by the commanding officer. *Fox v. Narramore*, 36 Conn. 376.

By statute in Ohio an action to enforce against a partnership a liability of the firm may be brought against the partnership either in the name of the firm or in the names of the partners who compose it, at the option of the plaintiff. See *Whitman v. Keith*, 18 Ohio St. 134.

<sup>1</sup> *Schmidt v. Gunther*, 5 Daly, 452.

<sup>2</sup> *Tiffany v. Williams*, 10 Abb. Pr. 204.

An action brought against "The City Club," of over seven persons, may be sustained where the complaint expressly charges that the defendants were members of and partners in an association or organization known as "The City Club," that existed on and prior to May, 1869, and up to August 1, 1870 (during which time the claim was created by them), either as original debtors or as assignees of a lease (a balance of rent being claimed) for the two years, which is alleged to have been made to three of the defendants, by authority of the defendants, and as agents, and for and in behalf of all of them, and for their use, and which they used and enjoyed. *Waller v. Thomas*, 42 How. Pr. 337.



consists of seven associates and upward.<sup>1</sup> The provisions of the act of 1849 in relation to suits by and against joint-stock companies and associations have been held to refer only to unincorporated companies and associations.<sup>2</sup> But inasmuch as the later decisions already referred to regard joint-stock associations as *quasi*-corporations, this decision must be regarded as qualified by them. The acts of 1849 and 1851 have been held not to embrace the fire companies of New York.<sup>3</sup> The acts of 1849 and 1851 conferred upon the officers therein authorized to sue and be sued no right to sue except in cases where the shareholders or associates could before have prosecuted. The intent of the statutes was to obviate the inconvenience of joining all the shareholders or associates as parties; to facilitate an existing right of action, and not to create a new one.<sup>4</sup> Said acts were intended to apply to suits having in view a remedy against the joint property and effects of such companies and associations. Where, therefore, an action merely seeks to restrain an unincorporated association by injunction from carrying into effect its resolution of suspension against a member of the association, it is not within the meaning of said acts, and is not well brought against the president merely.<sup>5</sup>

<sup>1</sup> *Tibbetts v. Blood*, 21 Barb. 650.

<sup>2</sup> *New York Marbled Iron Works v. Smith*, 4 Duer, 362.

<sup>3</sup> *Masterson v. Botts*, 4 Abb. Pr. 130.

<sup>4</sup> *Corning v. Greene*, 23 Barb. 33; affirmed, 26 N. Y. 472, note.

<sup>5</sup> *Rorke v. Russell*, 2 Lans. 244.

Persons who become members of a voluntary association which is neither a copartnership nor a corporation are bound by its rules, not being in conflict with the law of the land; and the courts can interfere no farther than to hold the association to a fair and honest administration of those rules. *White v. Brownell*, 4 Abb. Pr. (N. S.) 162;

<sup>2</sup> *Daly*, 329. See, also, *Leech v. Harris*, 2 Brewst. 571; *Lowry v. Stotzer*, 7 Phila. 397.

A member is not bound by an exercise of power on the part of his fellow-members to which he has not assented or which is not derived from the law of the land. *Leech v. Harris*, 2 Brewst. 571. See, also, *Lowry v. Stotzer*, 7 Phila. 397.

Equity will take cognizance of and enforce the rules and regulations of societies within the line of order and to correct abuses. *Potter v. Search*, 7 Phila. 443. See, also, *Lowry v. Stotzer*, 7 Phila. 397.

Where there is open to an ex-

The judgment in an action against the president under the statute, and execution thereon, are properly against the president as such, and they bind only the joint property of the association, not the individual property of the president nor the separate property of the individual members.<sup>1</sup>

Under the act of 1849, as amended by the act of 1853, actions against a partnership or association, consisting of seven or more persons, must be brought against the president or treasurer of such association, and the remedy against their joint property exhausted before an action can be brought against one or more of the individual associates.<sup>2</sup> When the judgment and execution against the company fail to secure satisfaction of the debt, then an action against the associates directly is proper.<sup>3</sup> Under said acts no action lies against the individual members upon the judgment obtained against the company.<sup>4</sup> The judgment against the president for a debt owed by the company does not preclude the individual members, when sued for the same debt, from contesting their liability for the debts of the company.<sup>5</sup> At most such judgment against the president can be no more than *prima facie* evidence in the plaintiff's favor in a subsequent action against the associates. It will not maintain his right to recover where the evidence shows that the judgment so recovered exceeds the amount for which the association or its members were liable in the action.<sup>6</sup> The liability of individual members of a joint-stock company, after judgment and execution returned unsatisfied

pelled member of a voluntary association a remedy under its constitution and laws for a review of the proceedings for his expulsion, and in case of error for his restoration, and the association is not a partnership, equity will not interfere. *Olery v. Brown*, 51 How. Pr. 92; *White v. Brownell*, 2 Daly, 329; 4 Abb. Pr. (N. S.) 162.

<sup>1</sup> *National Bank of Schuylerville*

*v. Van Derwerker*, 74 N. Y. 234; *Allen v. Clark*, 65 Barb. 563.

<sup>2</sup> *Robbins v. Wells*, 18 Abb. Pr. 191; S. C. 26 How. Pr. 15; 1 Robt. 666; *Allen v. Clark*, 65 Barb. 563. See, also, *Kingsland v. Braisted*, 2 Lans. 17.

<sup>3</sup> *Allen v. Clark*, 65 Barb. 563.

<sup>4</sup> *Witherhead v. Allen*, 3 Keyes, 562; S. C. 4 Abb. App. Dec. 628.

<sup>5</sup> *Allen v. Clark*, 65 Barb. 563.

<sup>6</sup> *Allen v. Clark*, *supra*.

against the company, under the act of 1849, as amended by the act of 1853, is that of partners, and consists in the original demand against the company, not the judgment against it.<sup>1</sup> The complaint must therefore allege a subsisting cause of action against the company on the original demand. Alleging that the company became indebted, to plaintiff for goods sold, without alleging a sum now due or a breach in any form, is not enough, even where judgment and execution unsatisfied are alleged.<sup>2</sup> A creditor of a joint-stock association must proceed against the surviving shareholders before an action can be maintained against the representatives of a deceased shareholder.<sup>3</sup>

As to actions between a joint-stock company and its members, it is not a valid objection to an action against a joint-stock company in the manner prescribed by the statute that the plaintiffs are members of the company.<sup>4</sup> And where the articles of association of an unincorporated joint-stock company provide that the board of directors thereof may prosecute and recover in an action at law any and every assessment upon the shares of stock, an action against one of the associates to recover an assessment upon his stock may, under the articles and the act of 1849, be maintained in the name of the president of the association.<sup>5</sup>

As to actions between the members themselves, the rule does not appear to be different from that which prevails between the members of an ordinary partnership,<sup>6</sup> a subject

<sup>1</sup> *Witherhead v. Allen*, 3 Keyes, S. C. 6 Lans. 319; *Saltsman v. 562*; S. C. 4 Abb. App. Dec. 628, reversing S. C. 28 Barb. 661. Compare *Miller v. White*, 50 N. Y. 137, reversing S. C. 10 Abb. Pr. N. S. 385; 59 Barb. 434. See, also, *Moore v. Brink*, 4 Hun, 402; S. C. 6 N. Y. Supreme Court, 22; *Kingsland v. Braisted*, 2 Lans. 17.

<sup>2</sup> *Witherhead v. Allen*, *supra*.

<sup>3</sup> *Moore v. Brink*, 4 Hun, 402; S. C. 6 N. Y. Supreme Court, 22.

<sup>4</sup> *Westcott v. Fargo*, 61 N. Y. 542; an action against the maker and

*Shults*, 14 Hun, 256.

See, however, *Schmidt v. Gunther*, 5 Daly, 542.

<sup>5</sup> *Bray v. Farwell*, 3 Lans. 495.

<sup>6</sup> Where a note made by one member of a joint-stock association (unincorporated), and indorsed by another for the purpose of raising money for the use of the association, is paid and taken up by a third, the latter cannot maintain

which has already been considered in a preceding chapter.

Respecting real estate conveyed to a joint-stock association, it was held in *Howell v. Earp*<sup>1</sup> that the right of such association to hold such real estate can only be questioned by the people.

In the settlement of the affairs of an unincorporated

first indorser to recover back the money advanced by him until an account has been taken between the parties. *Crater v. Bininger*, 45 N. Y. 545; S. C. 54 Barb. 155 (1865), following *Gridley v. Dole*, 4 N. Y. 486.

Plaintiff, defendant and others were shareholders in a joint-stock enterprise to purchase and improve lands containing a mineral spring, and held such lands as tenants in common. Plaintiff made and paid for certain improvements and assessed the cost ratably upon each shareholder. Plaintiff proved that he made a statement to defendant of the amount assessed upon him; that defendant took the figures on a paper and said that he "would pay him (plaintiff) the money;" would "be over in a few days and settle up—square up." *Held*, that the admission of a liability, coupled with a promise to pay, was sufficient to authorize a recovery by plaintiff against defendant. *Wright v. Putnam*, 2 Thomp. & Cook, 455.

The charter of an incorporated company, after declaring that the stockholders should be jointly and severally personally liable for the payment of all debts or demands contracted by the company, and that any person having a demand against the company might

sue any stockholder, etc., and recover the same with costs, further provided that before such suit upon any demand, etc., judgment must be obtained thereon against the company, execution issued and returned unsatisfied, etc. *Held*, that the charter placed the stockholders upon the same footing as if they had not been incorporated, making them answerable for demands against the company like partners; and consequently one stockholder, though a creditor of the company, could not maintain an action at law for his demand against the others or either of them. *Bailey v. Bancker*, 3 Hill, 188.

One member of a voluntary, unincorporated association for purposes of pleasure cannot maintain an action at law in behalf of the association against another member upon any agreement made with the association. *McMahon v. Rauhr*, 47 N. Y. 67.

As to the principles regulating contribution among the associates of a joint-stock company, see *Morrissey v. Weed*, 12 Hun, 491.

<sup>1</sup> 21 Hun, 393.

As to the wife's not being entitled to dower in real estate held in trust by one of several persons, partners in a speculation, see *Nicoll v. Ogden*, 29 Ill. 323.

joint-stock association it is of no consequence, as affecting the rights of the associates entitled to an interest therein, that the legal title to land belonging to the association has been taken in the name of one of the associates or in a third person.<sup>1</sup>

As respects the consolidation of joint-stock companies, where the articles of association of a company prohibit the union or consolidation of the company with any other, without the consent of a majority of the stockholders, but contain a clause providing for an amendment of the articles by a concurrent vote of two-thirds of the executive committee, and a majority of the trustees, the authority to amend the articles of association gives no power to take away from the stockholders the power to prohibit the merging of the company with any other company, which they had expressly reserved for their own protection; and such authority to amend should be construed as intended for such amendments as are pertinent to the business and objects for which the association was organized.<sup>2</sup>

In case of the consolidation of two joint-stock companies, although a dissenting shareholder, like a retiring partner in an ordinary partnership, is not obliged, in the absence of an express agreement to that effect, to surrender his interest in the property to his remaining associates at an estimated valuation, but has the right to have the valuation actually ascertained by a sale, in the ordinary manner of closing up partnerships where there is no express stipulation; yet, where the amount of dissentient stock is quite inconsiderable in comparison with the stock whose owners have acquiesced in the agreement of consolidation, the court will order the consolidated company to give bond with sureties, conditioned that upon final judgment all the property transferred to it shall, if so required by the judgment, be deliv-

<sup>1</sup> *Barker v. White*, 58 N. Y. 204;    <sup>2</sup> *Blatchford v. Ross*, 54 Barb. 42; *Butterfield v. Beardsley*, 28 Mich. S. C. 37 How. Pr. 110. 412.

ered into the custody of the court for the protection of all the shareholders.<sup>1</sup> Dissenting stockholders have no absolute right to have a sale at the commencement of the litigation, as soon as the property has been handed over to a receiver. If they are entitled to have the property sold their right is to have it sold when they have recovered judgment. All they can claim is that the property shall be preserved until judgment, so that their rights, as then ascertained and declared, may be enforced.<sup>2</sup>

The infidelity or misconduct of some or even all of the trustees or managers of a joint-stock association affords no ground for taking away the rights of the shareholders who constitute the company, either by dissolving it or taking away its management and placing it in the hands of an officer of the court. In such case the principles of remedial or preventive justice go no farther than to enjoin or forbid the misconduct, or to remove the unfaithful officer.<sup>3</sup>

Upon the dissolution of a joint-stock association it is the duty of the trustees to convert the assets into money and distribute the proceeds among the stockholders. They have no right to exchange the assets of the old association, or any portion thereof, for the stock of any corporation, without the consent of all the stockholders. A stockholder not

<sup>1</sup> *McVicker v. Ross*, 55 Barb. 247; S. C. 37 How. Pr. 474.

<sup>2</sup> *McVicker v. Ross*, *supra*.

<sup>3</sup> *Waterbury v. Merchants' Union Express Co.* 50 Barb. 157; S. C. 3 Abb. Pr. N. S. 163.

A joint-stock association, formed in the state of New York for the purpose of carrying on business in California for a definite period, the articles of which contain a stipulation that the association shall not be dissolved before the expiration of the term limited for its duration without the unanimous consent of the shareholders, cannot be

voluntarily dissolved except by the unanimous consent of all the shareholders; if such consent cannot be had then application must be made to a court to decree a dissolution. *Von Schmidt v. Huntington*, 1 Cal. 55. It being found impracticable, however, to keep the company together or to prosecute successfully the contemplated enterprise under the articles of association, the court decreed a dissolution and the distribution of the effects of the company. *Von Schmidt v. Huntington*, *supra*.

consenting to such exchange may recover the value of his stock so wrongfully disposed of.<sup>1</sup>

*Frothingham v. Barney*, 6 Hun, 366.

In the case of an unincorporated joint-stock company each shareholder has a direct proprietary interest in the assets of the company; while in the case of a corporation the corporation and not the shareholders own the assets. *Kellogg Bridge Co. v. The United States*, 15 Ct. Cl. 111.

Upon the dissolution of a voluntary unincorporated association,

such as a volunteer fire company, its members are entitled to their respective shares of the property of the association. *Hibernia Fire Engine Co. v. Commonwealth*, 93 Pa. St. 264.

If, however, the charter of such association provides otherwise for the disposition of such property it must be disposed of accordingly. *State Council v. Sharp*, 38 N. J. Eq. 24.





# INDEX.

[THE REFERENCES ARE TO THE MARGINAL PAGES.]

## ABANDONMENT —

of right, an answer to an action to enforce it, 470.  
of insurance, notice of by one partner good, 139.

## ABATEMENT —

plea in, abolished, 264. And see ADDENDA.

## ACCEPTANCE —

of bills. See BILLS OF EXCHANGE.  
in blank, power of partner to make, 130.

## ACCORD AND SATISFACTION —

when a defense to an action for an account, 515.

## ACCOUNT —

actions entitled to an, 492.  
co-owners, 56-62.  
partners, 492.  
persons interested in the estate of a deceased partner, 493.  
trustee of bankrupt partner, 493, 648.  
sub-partners, 493.  
servants sharing profits, 12, 13, 35, note (s), 493.  
transferee of share of partner, 364.  
old action of, 560, note (k).  
between co-owners, 59, 560, note (k).  
between merchants, 259.  
action, before the Judicature Acts, by one partner against  
another —  
for not rendering an, 563.  
for balance of an, 564.  
for matters involving the taking of an, 567.  
for matters not involving any, 564.

## ACCOUNT, ACTION FOR (see ACTION) —

who may bring, 492 *et seq.*  
partners, 492.  
persons entitled to share of partner, 493.  
servants, 493.  
sub-partners when, 493.  
creditors of deceased partner, 494  
against whom, 493, 496.  
costs of, 517.  
not dismissed because plaintiff entitled to damages, 458.  
where no dissolution is sought, 494 *et seq.*  
where a limited as distinguished from a general account is de-  
sired, 494.

## ACCOUNT, ACTION FOR (continued)—

- in respect of illegal transactions, 103.
- in case of mines, 493.
- where partner refuses to, 497.
- where partner attempts to compel a dissolution, 497.
- where business has failed, 493.
- discovery in, 501.
- in cases of exclusion, 496.
- of benefits obtained by one partner at the expense of the firm, 305 *et seq.*, 496.
- of profits derived from use of partnership property, 309.
- of profits derived by one partner by reason of his connection with the firm, 305.
- of profits made by the use of the capital of a partner since a dissolution, 521 *et seq.* See PROFITS, ACCOUNT OF.
- where profit not yet realized, 496.
- of several partnerships, 501.
- defenses to action for, 506. See DEFENSE.
  - denial of partnership, 507.
  - illegality of partnership, 105.
  - statute of limitations, 257 *et seq.*, 508 *et seq.*
  - account stated, 512.
  - award, 514.
  - payment, 515.
  - release, 516.
- parties to action for.
  - between partners generally, 459 *et seq.*
  - by sub-partner, 460.
  - against executors of deceased partner, 461.
  - surviving partners not necessary parties to action by legatees, 611.
  - some on behalf, etc., when sufficient, 461.
  - motion for, before hearing, 501.
- period over which an account is to extend, 519.
  - time from which the account is to be taken, 519.
  - time up to which the account is to be taken, 520.
- of dealings prior to commencement of partnership, 520.
- of subsequent profits when a dead or retired partner's capital has been left in the concern, 521–536. See PROFITS.
- judgment for a partnership, 516.
  - before trial, 501.
  - forms of, 516, 517, note (n).
  - just allowances in, 519.
  - evidence on taking, 536.
- judgment for, on the administration of the estate of a deceased partner, 600.
- See ACCOUNTS.

## ACCOUNT STATED—

- when binding on incoming partner, 209.
- a defense to an action for an account, 512.
- by a majority binding minority, 512, note (d).
- impeachment of, for fraud, etc., 513.
- re-opening, 420, 421.
- surcharging and falsifying, 513.
- between the executors of a deceased partner and his surviving partners, effect of, 613.
- action for balance of, not restrained because there are others unsettled, 543.

## ACCOUNTS —

- of partnership generally, 596.
- authority of partner to deliver, 128.
- authority of partner to settle, 128, 136.
- imputation of payments in cases of, 228.
- not to be taken backwards, 230.
- right to keep accounts of successive firms separate, 233.
- transfer of debt from one to another, 234.
- effect on incoming partner, 230.
- between merchant and merchant, time within which actions concerning must be brought, 257-263, 508 *et seq.*
- false rendered by one partner, liability of firm for, 165.
- approved of by majority, when binding on minority, 512, note (d).
- conclusive for one purpose, but not for another, 421.
- effect of keeping erroneous, on right to dissolve, 531.
- effect of confusion of, on right to interest, 392.
- penalties for falsifying, destroying, etc., 404.
- agreements as to keeping, 420.
- effect of non-observance of agreement to take periodical, 421, 422, 430.
- re-opening settled, 420, 421.
- effect of acquiescence in, 467.
- misrepresentations as to state of, a ground for rescinding contracts, 486.
- surcharging and falsifying, 513.
- evidence on which partnership accounts are taken, 536 *et seq.*
- special directions as to taking of, 537.
- injunction to restrain publication of, 542, note (e).
- ultimate adjustment of, 401.
- where equality of loss and inequality of capital, 402.
- settled by one executor, 488, note (m).
- mode of keeping partnership accounts, 396 *et seq.*
- duty to keep and the right to inspect partnership accounts, 404 *et seq.*
- of joint and separate estates to be kept distinct in bankruptcy, 693.
- how taken in bankruptcy, 695-697.
- See ACCOUNT, ACTION FOR.

## ACCOUNTANT —

- inspection of documents by, 504.
- employment of, by court, 533.
- modes of taking accounts by, different from legal mode, 396, 695-697.

## ACKNOWLEDGMENT —

- effect of, as regards the statute of limitations, 260, 511.
- when made by one partner, 263.
- See RATIFICATION, 143; LACHES, 466.

## ACQUIESCENCE —

- of plaintiff in what is complained of, when a bar to relief, 318, 467.

## ACT OF PARLIAMENT —

- persons procuring, not partners, 22.
- See STATUTE.

## ACTIONS —

1. Generally.
  - general remarks on, 264, 265, 456.
  - general principle as to parties, 265.
  - effect of non-recognition of firm on, 115, 116.

## ACTIONS (continued) —

## 1. Generally (continued) —

effect of Judicature Acts, 264.

no distinction between legal and equitable rules, 264.

no action defeated by non-joinder or misjoinder, 264.

pleas in abatement abolished, 264. And see ADDENDA.

as to persons jointly or jointly and severally entitled or liable, 265, 282.

joint and several claims may be joined, 265.

parties required by defendant may be joined, 265.

some or one may sue on behalf of all, 265.

partners may sue or be sued in name of firm, 115, 265, 274, 456, 458.

discovery of partners, 265.

as to use of where partners have changed, 266.

as to service of writ where name of firm is used, 272.

as to making defendants persons who ought to be co-plaintiffs, 267.

by firm against a partner, 459.

by partner against his firm, 267.

firms with common partner may sue each other, 267.

as to defenses founded on conduct of one partner, 267-270.

of deceased partner, 268.

for account. See ACCOUNT.

an injunction. See INJUNCTION.

a receiver. See RECEIVER.

rescission of contract. See RESCISSION OF CONTRACT.

specific performance. See SPECIFIC PERFORMANCE.

defenses to. See ACCOUNT, ACTION FOR; DEFENSE.

laches, 466 *et seq.* See LACHES.

illegality, 102 *et seq.* See ILLEGALITY.

against bankrupt not allowed, 718.

in respect of legal rights, 273 *et seq.*

equitable rights, 283 *et seq.*

in case of fraud, parties to, 281.

where one partner exceeds his authority, 282.

*ex delicto*, 278, 283.

by trustee of bankrupt partners and the solvent partners, 670.

by several trustees in bankruptcy, 646, 647.

may be brought by unknown principals, 275.

on contracts with A. & Co., 274.

formerly election between, and proof in bankruptcy, 718, note (d).

2. By partners against non-partners, 273 *et seq.*

illegality of partnership a defense to, 103.

implied powers of partner as to, 271.

on contracts under seal, 273.

on bills and notes, 274.

in name of firm, 274.

accepted for honor, 274.

on ordinary contracts, 275.

for torts, 278-280.

for libel, 278.

ejectment, 279.

by incoming partner, 284 *et seq.*

by retired and continuing partners, 286, 287.

by surviving partners, 267-269, 288.

## ACTIONS (continued)—

2. By partners against non-partners (continued)—
  - by trustees of bankrupt partners, 288, 289, 670.
  - by solvent partner, 289, 670.
  - by dormant partners, 276.
  - by nominal partners, 276.
  - when to be brought by one partner only, 277.
  - may be brought in name of those not named, 275.
  - non-joinder not pleadable in abatement, 264.
  - when one partner colludes with defendant, 279.
  - where contract not made with firm, 277.
  - by one firm against another where one partner is common to both, 267, 569.
  - when a defense against one partner is a defense against all, 116, 117, 267, 268.
3. By non-partners against partners, 280 *et seq.*
  - when one only may be sued, 281.
  - illegality of partnership no defense to, 103.
  - on contracts, 280.
    - not binding firm, 282.
  - for torts, 283.
  - against incoming partners, 285, 286.
    - retired and continuing partners, 286.
  - surviving partners, 288.
    - where the executors of the deceased are also being sued, 598 *et seq.*
  - effect of change in firm, 284, 285.
  - against solvent and bankrupt partners, 289.
  - infant partners, 280, 281.
  - dormant partners, 281.
  - for administration of estate of deceased partner by creditors of the firm, 598.
    - by separate creditors of deceased partner, 614 *et seq.*
    - legatees, 614 *et seq.*
    - next of kin, 614 *et seq.*
4. Between partners.
  - when court will not interfere, 464 *et seq.*
  - for an account, 491, 492 *et seq.* See ACCOUNT.
  - for discovery, 501 *et seq.* See DISCOVERY.
  - for dissolution, 461, 491, 570. See DISSOLUTION.
    - should be in the chancery division, 491.
    - parties to, 459, 461 *et seq.*
    - next friend of lunatic may bring, 579.
    - statement of claim in, 491.
    - judgment for, given before the hearing, 491.
    - may be brought, although the partnership could be wound up under the Companies Act, 491.
  - for injunction, 538. See INJUNCTION.
  - for a receiver, 545. See RECEIVER.
  - for specific performance. See SPECIFIC PERFORMANCE.
  - for fraud and misrepresentation, 479 *et seq.*, 481.
  - for rescission of contract, 483.
  - for recovery of real property, 560.
    - goods, 560.
    - damages, 561.
  - general rule that one partner could not sue another at law, 567.
  - when an action at law would lie, 562.
    - on agreements for partnership, 559.

## ACTIONS (continued) —

## 4. Between partners (continued) —

when an action at law would lie —

account, 560 and note (*k*).

for money paid by mistake in accounts, 566.

on agreement to indemnify, 566.

ejectment, 279, 562.

trespass, 562.

trover, 562.

covenant, 563.

*assumpsit* or debt —

for breach of express agreement, 290, 559, 563.

for not furnishing capital, etc., 563.

for not contributing to expenses, 564.

for not indemnifying copartner, 566.

for not accounting to copartner for money received to his use, 566.

on an award, 564.

for balance of account, 564.

on bills and notes, 565. See **BILLS**.

for penalty on breach of agreement, 563.

for rent, 565.

for contribution, 566. See **CONTRIBUTION**.

for amount of valuation, 564.

for money had and received for the use of the firm, 567.

for the recovery of deposit agreed to be paid, 559.

back of deposit, 559.

for share of the produce of sale, 568.

for share of surplus on dissolution, 569.

for matters unconnected with partnership business, 564.

between two firms with a common partner, 267, 569.

between a partner and his own firm, 115, 267, 471 *et seq.*

between persons who have agreed to become partners, 559.

by and against trustee of bankrupt partner, 288, 289.

for administration of estate of deceased partner. See **ADMINISTRATION**.

by surviving partners, 591.

## 5. Miscellaneous.

against sheriff for share of produce of sale of partnership firm, 568.

for misrepresentation and fraud, 479 *et seq.*

## ACTORS —

illegal partnerships between, 101.

## ACTS OF BANKRUPTCY —

what are, 625, 626.

relation back to, 650, 663.

not valid as *bona fide* dealings, etc., with bankrupt, 665. See **BANKRUPTCY**.

## ADEMPTION —

of legacies of shares, 620.

ADJUDICATION, 637 *et seq.* (see **BANKRUPTCY**) —

concurrent, 638.

joint after separate, 639.

## ADMINISTRATION —

of estate of deceased partner. See **DECEASED PARTNER: DEATH**.  
partner cannot prove in competition with the creditors of the firm, 599.

## ADMINISTRATION (continued)—

of estate of deceased partner —

action for, by surviving partners, 591.

creditors of the firm, 598.

separate creditors, legatees or next of kin of deceased, 610.

effect of, on rights of creditors, 594 *et seq.*

under order of the court, 594.

of estates of bankrupt partners. See BANKRUPTCY.

ADMINISTRATOR. See EXECUTOR.

## ADMISSIONS —

may be shown to have been mistaken, *Newton v. Belcher*, 12 Q. B. 921, and *Newton v. Liddiard*, id. 925.

of person that he is a partner, not conclusive, 87, 88.

of one partner; when evidence against copartner, 87, 128.

when binding on firm, 128, 219, note.

of one co-owner, effect of, 128, note (l).

effect of, as regards payment into court being directed, 505.

by one partner, effect on statute of limitations, 261.

## ADOPTION —

by firm of losses not chargeable to it, 388.

See, also, RATIFICATION.

## ADVANCES —

to a firm by trustees after the partners are changed, 113.

how distinguished from capital, 320.

securities for, effect of change in firm on, 119.

by partner, 381.

right to reimbursement, 381 *et seq.*

interest on, 390.

effect of declining to make further, 550, note (a).

See, also, LOANS.

ADVENTURE. See PARTNERSHIP.

## ADVERTISEMENTS —

evidence of partnership, 89.

of dissolution of partnership, 222.

effect of, 222, 223.

partner ordered to sign, 214.

when to be stamped, 223.

false representations by, action for, 481.

interfering with receiver by, contempt of court, 554, note (c).

See, also, NOTICE.

## AFFIDAVITS —

of one partner cannot be sworn before his copartner, 117, note (h), 624.

## AFTER-ACQUIRED PROPERTY —

covenant to assign, proof in respect of, in bankruptcy, 708, note (n).

vests in trustee in bankruptcy, 646

## AGENCY —

general doctrines of.

as regards partnerships, 124 *et seq.*

effect of change of firm, 113.

when a partner's agency commences, 201.

when it ends, 210.

**AGENCY (continued)—**

- as regards dormant partners, 125.
  - termination of, by notice, 210.
  - continuing for purposes of winding up, 217.
  - liability of persons sharing profits, depends on, 31.
- See, also, AGENT; AUTHORITY; IMPLIED POWERS; LIABILITY.

**AGENT—**

- each partner agent for firm, 124.
  - power of partner to appoint, 129, 147.
  - revocation of authority of, effect of, 371.
  - ratification of acts of by principal, 148, note (a), 371.
  - payment by to principal when a protected transaction, 665, note (r).
  - contracts of, under seal, 177.
  - parol, 177.
  - duty of, to account for profits, 305 *et seq.*, 307, note (r).
  - exceeding his authority, liability of, 192, 370.
  - acting without authority, 371, 372.
  - of firm, to whom to account, 288, note (y).
  - right of, to indemnity from his principal, 369. See INDEMNITY.
  - liability of, for acts done for non-existent principal, 163, 168.
  - liability of principal for torts and fraud of, 149.
  - for foreign principals usually contracts as principal, 288, note (y).
  - sharing profits, not necessarily a partner, 35.
- See, also, AGENCY; AUTHORITY; IMPLIED POWERS; LIABILITY.

**AGREEMENT—**

- whether a partnership or not depends on intention of parties, 10.
  - for partnership, see CONTENTS, Book I, ch. 1.
  - unconcluded, 19.
  - proof of, 80 *et seq.*
  - action on, 559.
  - part performance of, 83.
  - specific performance of, 475.
  - laches a defense to an action to enforce, 467.
  - rescission of, for fraud, 479 *et seq.*
  - proof by one party to, against another in the event of bankruptcy, 727, 738.
  - between partners.
  - determines what is partnership property, 329.
  - may be evidence of a partnership, 89.
  - how far it affects third parties, 168 *et seq.*
  - construction of, see ARTICLES OF PARTNERSHIP.
  - not to carry on trade or business, enforced when, 437.
  - articles of partnership may be waived by tacit, 408, 409.
  - for appointment of a receiver, 550.
- See, also, CONTRACTS; RESCISSION OF CONTRACT; SPECIFIC PERFORMANCE; CONSIDERATION.

**ALIEN—**

- partners, 72.
- enemies, 72.
- who are, 72, 73.
- liability of, to bankruptcy law, 624, note (n).

**ALLOWANCE—**

- bankrupt's, 753.

**ALLOWANCES—**

- in respect of—
- trouble, extra work, etc. 380.
- to executors and surviving partners, 592.



**ALLOWANCES** (continued) —

in respect of —

- treating customers, 380, note (*n*), 384.
- outlays generally, 381 *et seq.*
- money paid in discharge of debts, 382.
- useless expenses, 382.
- Indian, 381.
- services performed after dissolution, 381.
- unauthorized outlays, 383.
- charges for valuation, 384.
- outlays on the property of one partner, 384.
- expenses incurred for firm, but not charged to it in previous account, 383.
- unexplained expenses, 384.
- secret service money, 384.
- advances generally, 381 *et seq.* See **ADVANCES**.
- liabilities and losses, 385.
- losses attributable to one partner only, 387.
- misconduct or negligence, 387.
- illegal acts, 377, 378.

interest, 389.

agreements as to, 418.

just, 380 *et seq.*, 519.See **CONTRIBUTION**; **INDEMNITY**.**AMALGAMATION** —

effect of, on sureties, 118.

on securities, 119.

See **CHANGE IN FIRM**.**AMBASSADOR** —

cannot be sued in respect of commercial transactions, 72.

**ANNUAL** —accounts, effect of not taking, 430 *et seq.***ANNUITY** —

in lieu of profits, or out of profits, 28, 36.

to widow, agreements as to, 435.

**ANNULLING** —adjudications of bankruptcy, 642. See **BANKRUPTCY**.on equitable grounds, 636, note (*x*).

effect of, 645.

**ANSWER IN CHANCERY** —

evidence of partnership by, 89.

denying partnership, 507.

discovery when partnership was denied in, 507.

See **PAYMENT IN COURT**.**APOTHECARIES** —partnership between unqualified, 98, 99, note (*p*).**APPEARANCE** —

how entered, 266.

one partner can authorize entry of, on behalf of firm, 271, note (*y*).**APPLICATION OF MONEY** —

firm not liable for money because it has had the benefit of it, 189.

exceptions, 191.

## APPOINTMENT —

- held by firm, effect of change of partners on, 114.
- held by one partner.
  - official, 414.
  - agreements as to, 414.
  - valuation of, on dissolution, 558.
  - when assets, 331.
- of successor in firm, 434.
- when partnership property, 331.

## APPORTIONMENT —

- of premiums, 64-69.
- of dividends, 621.
- of profits, 621.

## APPRENTICES —

- discharge of, on change in firm to which they are bound, 117, note (k).

## APPROPRIATION OF PAYMENTS —

- generally, 229-236.
- discharge of retired partner by, 229.
  - estate of deceased partner by, 229.
  - dormant partner by, 229.
  - surety by, 230.
- where one partner pays his own debt with moneys of firm, 225.
- where there is a single current account, 230.
- where there are several distinct accounts, 231.
- where dividend is paid on several debts, how applied, 228, 235.
- cases in which rule applicable to single accounts does not apply, 231.
- against debtor as well as creditor, 230.
- effect on incoming partners, 230.
- where debts owing to firm and member of it, 236.
- in cases of fraud, 235, 236.

## APPROPRIATION OF SECURITIES —

- in case of bankruptcy, 714, 720, note (n).

## ARBITRATION —

- staying actions, etc., after agreement to refer, 453.
  - power of partner to bind firm by submission to, 129, 272.
  - ratification of submission to by copartners, 129.
  - effect of agreement for, on action for account, 514.
  - dissolution of partnership by, 454, 572, note (n).
  - usual clauses relating to, 451.
  - clause in articles as to, applies to partnership continued after expiration of term, 411.
- See AWARD.

## ARBITRATOR —

- power of, on general submission, 454.
- cannot appoint receiver, 454.

## ARRANGEMENT —

- by firm with its creditors under Bankruptcy act, 1883, 754 *et seq.*
- void if not registered, 756.

## ARREST —

- for debt, effect of, 238.

## ARTICLES OF PARTNERSHIP —

- illegal clauses in, do not necessarily make the partnership illegal, 91.
- proof of, not essential to establish a partnership, 87.
- to be drawn up, 23, 412.
- effect of retrospective, 88, 412.
- effect of deferring execution of, as regards creditors, 202.
- not dating, 412.
- actions for breaches of, 559.
- specific performance of clauses in, 475 *et seq.* See SPECIFIC PERFORMANCE.
- general rules for construing, 406 *et seq.*
  - not intended to define all the rights and duties of partners, 406.
  - to be construed with reference to object of partners, 407.
  - and so as to defeat fraud, 407.
  - and the taking of unfair advantages, 408.
  - provisions in, may be tacitly waived, 408.
  - extend to partnership continued after the time fixed for determination, 410, 411.
- variation of, 409.
- remarks on clauses in, 406.
  - usual clauses, 411 *et seq.*
  - nature of the business, 412.
  - place of business, 412.
  - commencement of the partnership, 412.
  - future formal articles, 413.
  - name or style of firm, 413.
  - duration of the partnership, 413.
  - premiums, 413.
  - property of the firm, 414.
  - capital of firm, 320, 414 *et seq.*
  - appointments held by partners, 414.
  - prohibitions against carrying on business, 436.
    - after sale of the business, 437.
  - deeds and papers in the custody of firm of solicitors, 438.
  - good-will, 415, 439 *et seq.*
  - bringing in debts as capital, 417.
  - getting in debts on dissolution, 448.
  - assignment of share of outgoing or deceased partner, etc., 449.
  - indemnity to be given by continuing to outgoing partner, etc., 450.
  - effect on lien, 451.
  - reference of disputes to arbitration, 451 *et seq.*
  - penalties and liquidated damages, 454.
  - trade secrets, etc., 415.
  - patents, 415.
  - inventions, 415.
  - amount of debts, 417.
  - guaranty against debt, 418.
  - allowances, 418.
  - interest, 418.
  - moneys to be drawn out, 418.
  - expenses to be charged to the firm, 418.
  - conduct of partners, 418.
  - effect of covenant to be true and just, etc., 418.
  - servants, 419.
  - attention to be given to business, 419.
  - powers of majority, 419.

## ARTICLES OF PARTNERSHIP (continued) —

- remarks on clauses in —
  - powers of one partner by agreement, 418, 419.
  - partnership books, 420.
  - solicitor's papers, 438.
  - mode of taking accounts, 420.
  - effect of not keeping accounts as agreed, 430.
  - conclusiveness of settled accounts, 420, 421.
  - retiring from firm, 422.
  - sale of share, 422, 423.
  - offer of share to copartner, and purchase by him, 423 *et seq.*
  - dissolution, 425.
  - premiums, return of, 66, 413.
  - insolvency of member, 425.
  - insanity of member, 425.
  - notices of dissolution, 425, 426.
  - expulsion, 426 *et seq.*
  - valuation of share, 429 *et seq.*
  - methods of avoiding sale, 429.
  - introduction of new partners, 433 *et seq.*
  - settled share, 434.
  - transmission of share to non-partners, 433.
  - annuities to widows, etc., 435.

## ASSETS —

- of firm, what are, 320, 322. See PROPERTY.
- good-will included in, 443.
- distributable *pari passu*, 709.
  - except in cases mentioned, 709, note (z).
- of deceased partner, effect of continuing them in the partnership business, 606, 614 *et seq.*
  - liability of to creditors of firm, 594, etc.
    - for acts of executor, 606, 609.
  - proof of bankrupt executor for, when allowed, 608.
  - where improperly left in business, 608, 724.
  - properly left in business, 608, 722.
- See, also, ADMINISTRATION; BANKRUPTCY; DECEASED PARTNER; DEATH.

## ASSIGNEES IN BANKRUPTCY. See TRUSTEE IN BANKRUPTCY.

## ASSIGNMENT —

- of debt,
  - effect of, as regards set-off, 296.
  - notice of, necessary to take it out of the reputed ownership of the assignor, 679.
  - how to be made since the Judicature Act, 285.
- of share in partnership, 363.
  - stamp on, 450.
  - difference between and release, 450.
  - effect of, as regards dissolution, 583.
  - position of assignee, 363 *et seq.*
  - right of assignee to an account, 364, 493.
    - to a dissolution, 584.
  - by outgoing to continuing partner, 449.
- of property, when an act of bankruptcy, 627.
- right of solvent partners to make, 671.
- of choses in action, 129.
- for the benefit of creditors, 129.
  - dissolves firm, 363, note.
- See SHARES; TRANSFER OF SHARES.

- ASSUMED NAME** —  
trading under, not illegal, 92.  
statutes construed, 92.
- ASSUMING** —  
to act as corporation, 93.
- ATTACHMENT** —  
of debts, 299.  
of firm assets, 358, note; 362, note.  
of interest of one partner, 358, note.
- ATTORNEY** (see **SOLICITORS**) —  
powers of, to draw bills, effect of, 130.  
warrant of, given by one partner, 272.
- ATTORNEYS** (see **SOLICITORS**) —  
partnerships between, 100, 120, 146, 151, 211, 301, 310, 380, 382.
- AUCTION** —  
share of bankrupt partner need not be by, 649, note (s).  
debtor under *fi. fa.*, 358.
- AUTHOR AND PUBLISHER** —  
partners in profits only, 14.  
partnerships between, duration of, 122.  
liability of, to creditors, 179, 203.  
powers of, to make purchases, 144.
- AUTHORITY** —  
to hold out as partner, 42, 43.  
of one partner to act for firm, 124 *et seq.*  
where change in the firm, 113.  
of dormant partner, 125.  
in cases of extraordinary necessity, 126.  
revocation of, effect of, 371.  
misrepresentation of, 481, note (p).  
of one partner, liability of firm for untrue statements as to, 165, 166.  
excess of, effect of notice of, 167, 168, 176.  
liability of agent in cases of, 163, 167, 192.  
See **AGENCY**; **AGENTS**; **IMPLIED POWERS**.
- AWARD** —  
money awarded to one partner, when it does not belong to firm, 325.  
dissolving partnership, authorized by general admission to arbitration, 426, 454.  
disposing of business, effect of, 442.  
a defense to an action for account, 514, 515.  
mistakes in, when set right, 514.  
See **ARBITRATION**.
- BAILIFF** —  
to distrain, appointment of, by one partner, 137.
- BALANCE** —  
of account, action by one partner against another for, 564.  
in hands of partner, interest on, 390.
- BANK-NOTES** —  
issue of, 96, note (z).
- BANK OF ENGLAND** —  
privileges of, 96, note (z).

## BANKERS —

- illegal partnerships between, 95 *et seq.*
- returns to be made by, 95.
- issue of notes by, 96, note (z).
- number of persons who may be in partnership as, 96.
- books, production of, on action for account, 537, note (f).
- liability of, for misapplication of money, 152, 158.
- account with, assent to transfer of, 135.
- compound interest, when payable by, 390, note (s).
- direction to, not to pay check of firm, 133.

## BANKING ACCOUNT —

- power of partner to open, 129.
- overdrawing, is borrowing money, 132.

## BANKING COMPANIES —

- issue of notes by, 96, note (z).

## BANKRUPT —

- who may be made, 623, 624.
- who may make a person, 633.
- partners.
  - dormant partners may be, 633, 637.
  - nominal partners may be, 633, 637.
  - allowance to, 753.
  - need not join in suing on joint contract, 289.
  - court in bankruptcy may restrain action against, 289, 718.
- companies, 633.

See BANKRUPTCY; TRUSTEES IN BANKRUPTCY.

## BANKRUPTCY (see the ANALYSIS OF CONTENTS, Bk. IV, ch. 4) —

## 1. Generally, 622.

- who may be made bankrupts, 623, 624.
- proceedings against firms, 623.
  - in firm's name, 623.
- disabilities of partners of officials in, 117, 624.
- difference between traders and non-traders as to, 624.
- as to companies, 623.
- what are acts of, 625-633.
  - time of commission of act of, 633.
- fraudulent conveyances, 627, 659.
  - preferences, 628, 659.
- sales for present consideration, 629.
- protected transactions, 630, 654, 665.
- petition for adjudication of, 633 *et seq.*
- trustee in. appointment and choice of, 644 *et seq.* See TRUSTEE IN BANKRUPTCY.
- what property he takes, 646 *et seq.*
  - land, 651.
  - chattels, 651.
  - onerous property, 651.
  - books of account, 652.
  - shares, debts, good-will, etc., 652.
  - not trust property, 652.
  - benefit of contracts, 652.
  - liability in respect of contracts, 651, note (k).
  - share of profits made since, when, 526.
  - property in reputed ownership of bankrupt, 676.
  - relation back of title of trustee, 663.
- appointment of inspectors in, to protect one class of creditors against another, C45.

## BANKRUPTCY (continued)—

## 1. Generally (continued)—

consequences of.

dissolves firm, 576, 640.

trustees does not become partner, 648.

as regards the bankrupts, and their power of dealing with the assets of the firm, 212, 666 *et seq.*as regards the solvent partners, and their power of dealing with the assets of the firm, 212, 669 *et seq.*

as regards execution creditors, 674.

where some partners are abroad, 675.

as regards agreements between partners affecting their property, 335.

as regards avoidance of voluntary settlements, 654.

share of bankrupt, how ascertained, 649.

power of one partner to act for firm in proceedings in, 624.

actions by and against partners in cases of, 288, 289.

return of premiums in event of, 65, 67.

holding out after bankruptcy of one partner, effect of, 212, 700.

## 2. Adjudication of bankruptcy.

persons liable to, 624.

what acts are necessary to sustain, 625 *et seq.*

time within which must be obtained, 628.

petition for, 625, 633 *et seq.*

who may petition for, 633.

amount of petitioning creditor's debt, 634.

nature of petitioning creditor's debt, 634.

circumstances precluding petition, 634.

effect of death of partner, 638.

common partners, 637, 641.

by one partner against another, 635.

where improper, 636.

creditor of firm may obtain a separate adjudication against one partner, 637.

by creditor whose debt is merged, 257.

joint, what will sustain, 632, 637.

choice of trustee under, 644.

appointment of inspectors under, 645.

dormant or normal partner may be included in, 633, 637.

made against partners individually, 623.

annulling and superseding.

causes for, 637-641.

consequences of, 643.

costs of, 642.

staying proceedings instead of, 642.

after certificate, 642.

legality of, 642.

consolidation of separate adjudications, 643.

prosecution of joint and separate in same court, 644, note (r).

concurrent adjudications, 638.

in England and Ireland, 640.

several adjudications against same person, 639.

3. Administration of partners' estates in, 691 *et seq.*

general principle that each estate shall pay its own creditors, 692.

distinct accounts of joint and of separate estates to be kept, 693.

joint and separate dividends to be declared together, 693.

where connected firms, 693.

costs of, how payable, 694.

remuneration of trustee in, 694.

## BANKRUPTCY (continued)—

3. Administration of partners' estates in (continued) —
  - correcting mistakes as to, 695, 746.
  - agreement converting joint into separate estate, *et vice versa*, 698.
  - effect of doctrine of reputed ownership, 700.
  - of holding out as partner, 700.
  - joint and separate debts, what are, 701.
  - bill accepted after bankruptcy, 673.
  - consolidation of the joint and of the separate estates, 695.
4. Administration of the joint estate, 697, 720 *et seq.*
  - joint creditors to be first paid out of the joint estate, 692, 720.
  - rights of executors of deceased partner, as regards, 722.
  - two firms with common partner, 724.
  - proof by separate creditors against joint estate, allowed —
    - in cases of fraud, 725.
    - where there are distinct trades, 725.
    - where partner has obtained order of discharge and become creditor, 725.
  - surplus of joint estate, how to be dealt with, 728, 742.
5. Administration of the separate estates, 692, 729.
  - separate creditors of each partner to be first paid out of his separate estate, 692, 729.
  - proof by joint creditor against a separate estate, allowed —
    - where there is no joint estate, 731.
    - where no solvent ostensible partner, 731.
    - although one partner dead, solvent, 732.
    - joint estate very small, 732.
    - in cases of fraud, 733.
    - where there are distinct trades, 736.
    - in favor of petitioning creditor himself, 731, note (u).
  - surplus of separate estates, how to be dealt with, 730.
  - proof by partners against each other's separate estates, 737.
  - not allowed to the prejudice of joint creditors, 737, 740.
  - where partner has paid joint debts, 741.
  - by person who has held himself out as a partner, 742, note (b).
  - in cases of fraud, 739.
  - where there are no joint creditors, 740.
  - proof for what is not satisfied by lien, 741.
  - proof by company against estate of bankrupt shareholders, 739.
  - election by joint and separate creditors, 743.
  - double proof, 719, 743, 747.
  - position of petitioning creditor, 747.
  - statutory enactment as to, 748.
  - splitting demands, 749.
6. Proof of debts in.
  - general rules as to, 707.
  - what debts may be proved, 707, 708.
  - equitable securities, 715.
  - in respect of torts, when, 708, note (y).
  - indemnity, 708, note (y).
  - breaches of trust, 707, and note (t).
  - by *cestui que trust*, 717.
  - by bankrupt in respect of trust property, 707.
  - by secured creditors, 709, 714.
  - where secured bills, 709, 710.
  - where drawer bankrupt, 710, 711.
  - acceptor bankrupt, 811.



**BANKRUPTCY (continued) —****6. Proof of debts in (continued) —****by secured creditors —**

where both drawer and acceptor bankrupt, 712.

effect of rule in *Waring's Case* on, 712.

application of rule, 713.

position of holder of bills, 711.

by executors of deceased partner against survivors, 722.

by solvent partners against estate of copartner, 721, 737, 740.

by public officer, 740.

by company against estate of bankrupt shareholder, 739.

against joint estates, 720.

against separate estates, 729.

against both estates, 743.

rule as to election, 745.

where double proof is allowed, 747.

splitting demands, 749.

where there is no joint estate, 731.

mutual credits. . See SET-OFF.

rule that creditor cannot sue and prove, 718.

creditor may prove against bankrupt partner and sue solvent partners, 257.

marshaling, effect of on, 717, 718.

interest on, 719, 720.

where foreign adjudication, 719.

composition in, effect of as regards joint debt, 238.

discharge of bankrupt, effect of on, 223, note, 752.

**Bankruptcy of shareholders.**

company, how far dissolved by, 649, 650.

shares of, vest in trustee on, 652.

**Bankrupt's order of discharge, 751 *et seq.***

allowance, 753.

**Arrangements with creditors, 754 *et seq.*****BANKRUPT PARTNERS —**

cannot deal with property of firm, 666.

payments made to, 668.

See BANKRUPTCY.

**BENEFIT —**

of money, effect of having had, 189 *et seq.*

of contract, 189.

liability of firm for, in equity, 191.

proof against joint estate in respect of, when, 703.

resulting to one partner from connection with firm, 309, 310.

**BEQUEST. See LEGACY.****BILLS OF ACCOUNT —**

evidencing partnership, 89.

**BILLS OF EXCHANGE —**

proof of partnership by means of, 89.

issue of, by bankers, 96, note.

do not merge debt to secure which they are given, 254, 704.

power of one partner to bind firm by, 129, 130.

when given for his own private debt, 171.

when given after dissolution, 210-214.

authority to transfer, 131.

to indorse in name in which it is drawn, 131.

to accept in blank, 131.

one partner taking, in satisfaction of debt, 136.

## BILLS OF EXCHANGE (continued) —

- drawn by one partner on firm, effect of, 116.
  - firm on another where common partners, 115.
  - for old debt, a fraud on new partner, 209.
  - in name of firm after bankruptcy, 673.
- payable to officer for time being, 180, note (a).
- accepted for honor, 274.
- acceptance of, need not be signed, 186.
- of firm, undertaking of one partner to provide for, when due, 139.
- negotiation of, by partners who have committed acts of bankruptcy, 667, 673.
  - by solvent partners where their copartner is bankrupt, 674.
- one partner has no power to guaranty payment of, on account of firm, 138.
- injunction to restrain negotiation of, 542.
- who liable on, 180 *et seq.*
  - effect of form of, 180.
  - when name of firm is on them, 171, 173, 180.
  - when name of firm is not on them, 184.
  - when two firms with same name, 181 *et seq.*
  - where name of firm same as individual, 182.
  - mistake in name, effect of, 185.
- liability of incoming partner for bills accepted by copartners for old debt, 209.
- proof against joint estate in respect of, what, 207.
- secured by charge on goods, 709 *et seq.*
  - rights of drawer and acceptor, 710.
  - right of holder, 711.
  - effect of bankruptcy of drawer on, 710, 711.
    - of acceptor, 711.
  - rule in *Ex parte Waring*, 712.
    - effect of, 713.
- given by continuing partner for old debt, effect of, 242 *et seq.*
- actions by partners on, 274.
- action by one partner against another for not taking up, 566.
- action by one partner against another on, 565, 567.
- set-off in bankruptcy in respect of, 656, 657.
- buying up, to avoid set-off in bankruptcy, 663.
- See, also, PROMISSORY NOTES.

## BILLS OF EXCHANGE ACT, 131, 180, 181.

## BILLS OF SALE ACTS —

- effect of, on transactions between executors of deceased partner and surviving partners, 593, note (r).
- as regards property vesting in trustee in bankruptcy, 651, note (l), 679.
- on doctrine of reputed ownership, 679.

## BLOCKADE —

- partnership for running, not illegal, 92.

## BONA NOTABILIA —

- shares in partnerships are, 340.

## BOND —

- implied power of partner as to, 131, 137.
- merges simple contract debt, 256, 703.

BONUSES—

right of legatee of shares to, 621, note (*u*).

BOOK DEBTS—

of bankrupt partner may be sold by trustee, 652.

BOOKS—

as evidence of a partnership, 84.  
 duty of partners to keep proper, 404.  
     to allow them to be inspected, 404.  
 agreements as to custody of partnership, 420.  
     specific performance of, 479.  
 delivery of, to receiver, 554.  
 entries in, are evidence against all the partners, 536.  
 production of, in actions for account, 501 *et seq.*, 537.  
 production of banker's, 537, note (*t*).  
 effect of withholding, on taking accounts, 405, 538.  
 right of trustee of bankrupt partner to, 652.  
     See, further, ACCOUNTS; INSPECTION.

BORROWING MONEY—

power of one partner to bind firm by, 131.  
     in case of urgent necessity, 126, 131.  
     from trustees, 162.  
 distinction between, and getting things on credit, 133.  
 distinction between, and increasing capital, 132, 133, 321.  
 effect of having had benefit of, 189 *et seq.*

BOVILL'S ACT, 35 *et seq.*

BREACH OF TRUST—

liability for, joint and several, 161, 162, 198, 199, 200, 702.  
 by one partner, liability of firm for, 199.  
 liability of estate of deceased partner for, 596.  
 following money, 162, 521 *et seq.*  
 notice of, effect of, 143.  
 notice of, by one partner, when not notice to firm, 142.  
 by not getting in share of deceased partner, 614.  
 effect of lapse of time on, 260.  
 remedy for, when barred by statute of limitations, 260, 511.  
 proof in bankruptcy, in respect of, 702, 707 and note (*t*), 717.  
 double proof for, 745, 749.  
 assets brought in in, not joint estate, 724.  
     See TRUSTEE; TRUSTS.

BROKERS—

partnership between unqualified, 97.  
 discovery by, 97.

BUBBLE ACT, THE, 101.

BUILDING SOCIETIES

members of, sharing profits, not *prima facie* partners, 12, note (*m*).

BUILDINGS—

on partnership property, 330, 331.

BUSINESS—

of partnership, limits the authority of a partner to act for firm,  
     124 *et seq.*  
 right to transact, 301.  
     unless otherwise agreed, 10, 302.

## BUSINESS (continued)—

- agreement not to carry on, 436.
  - when implied, 442.
  - specific performance of, 437 and note (o).
- vendor and purchaser of, when partners, 28.
- power of partner to extend, 137.
  - to alter, 315, 316.
- untrue statements as to nature of, liability for, 166.
- effect of selling on right to carry on, 440, 441.
- effect of award disposing of, 442.
- of partnership, agreements as to, 412.
- profits of distinct, how far to be accounted for, 310-313.
- place of, power of majority to decide upon, 315.
- carried on abroad, income tax, when payable for, 394, note (c).
- refusal to meet on matters of, ground for dissolution, 581.
- hopeless state of, ground for dissolution, 576.
- See GOOD-WILL.

## CALLS—

- proof for future, in bankruptcy, 708, note (u).

## CANCELLATION. See RESCISSION OF CONTRACT.

## CAPACITY OF PARTNERS, 71.

- infants, 74.
- lunatics, 76.
- married women, 77.
- corporations, 78.
- companies, 78.
- aliens, 72.
- felons, 73.
- outlaws, 73.
- partnerships, 78.

## CAPIAS. See EXECUTION.

## CAPITAL—

- generally, 320.
- how distinguished from advances, 320.
- action by one partner against another for not contributing, 563.
- of the firm, agreements as to, 414.
- interest on, 389.
  - when payable out by instalments, 39, note (o).
- bequest of partner's, what it passes, 619.
- increasing capital, 132, 321.
- loss of, ground for dissolution, 576.
- continued employment of, 521 *et seq.*
- losses of, how shared, 349.
- paying profits out of, 394, note (e).
- withdrawing, 321.
- should be money, 415.

## CARRIERS—

- actions against, 281, 282.
- copartners need not be joined, 282.
- notice to one of a firm of, effect of, 143.

## CARTS—

- names on, evidence of partnership, 89.

## CERTIFICATE —

- staying bankrupt's, until partnership accounts are taken, 752, note (s).
- annulling adjudication after grant of, 642.
- See BANKRUPTCY; ORDER OF DISCHARGE.

## CESTUI QUE TRUST —

- liability of, to indemnify trustee, 373 *et seq.*
- proof by, in bankruptcy of trustee, 717.
- how far right of double proof, 745, 749.
- of partner's share not a partner, 584.
- rights of, against executors of deceased partners, 614.
- See, too, BREACH OF TRUST.

## CHAMBERS. See ORIGINATING SUMMONS.

## CHANCERY DIVISION —

- transfer of proceedings to, when necessary, 598.
- actions between partners should be brought in, 491.

## CHANGE IN CONSTITUTION. See MAJORITY.

- one dissentient can forbid, 315.

## CHANGE IN FIRM —

- effect of, 113.
- on sureties, 117.
- on securities, 117.
- on equitable mortgages, 119.
- on lien of solicitors, 120.
- on actions by and against it, 284.
- as regards set-off, 291, 296.
- on property of firm, 336.

## CHARGE OF DEBTS —

- on estate of deceased partner, effect of, 260.

## CHARITABLE USES ACT —

- share of partner in partnership assets within, 348.

## CHATTELS REAL —

- not within the doctrines of reputed ownership, 678.

## CHEMISTS AND DRUGGISTS —

- partnership between unqualified, 98, note (l).

## CHEQUES —

- firm bound by, though drawn by one partner, 133.
- if not post-dated, 133.
- direction by partner to bankers not to pay, effect of, 133.
- of directors, 133, note (d).

## CHOSSES IN ACTION —

- application of doctrine of reputed ownership to, 678.
- shares are, 678, note (k).
- debentures are, 678.
- devolve on surviving partners, 341.

## CIRCULARS —

- evidence of partnership, 89.
- notice of dissolution by, 222, 223.

## CLERGY —

- may be partners, 71.

## CLERKS —

- notice to, effect on firm, 113.
- sharing profits, when partners, 13.

## CLUBS (see UNINCORPORATED JOINT STOCK COMPANIES) —

- not partnerships, 50.
- can be wound up under the Companies Act, 1862, 50, note (i).
- need not be registered under, 50.
- liability of managers of, 45.
- interference in internal regulations of by court, 466.

## COACH OWNERS —

- partners in profits only, 13.
- liability of, for each other's negligence, 149.
- for fodder, etc., 179.

## CODE CIVIL —

- definition of partnership in, 2.

## COGNOVIT —

- given by one partner, 272.

## COLLIERY. See MINES.

## COLLUSION —

- by one partner, effect of as regards copartner, 267, 279.
- effect of, as regards rescission of agreements between executors of deceased and surviving partners, 488.
- releases given by, 145, 146.

## COLONIAL JUDGMENT —

- does not merge debt for which it is obtained, 255, note (s).

## COMMENCEMENT —

- of partnership, 20 *et seq.*
- presumptive date of, 201 *et seq.*, 412.
- agreements as to, 412.
- of liability of partners for each other's acts, 201 *et seq.*

## COMMISSION —

- effect of dividing, between partners, 28.
- of bankruptcy. See BANKRUPTCY.
- duty of partner to account to firm for, 307, note (r), 309, note (b).
- partners cannot charge, 380.

## COMMITTEE —

- of lunatic partner, 578.
- exercising right of pre-emption, 578, note (m).

## COMMON CARRIERS —

- as partners, 10, 26, 40.

## COMMON LAW —

- legality of companies at, 101.
- extent of liability of partners at, 200.
- actions by one partner against copartner, 562, etc. See ACTION.

## COMMON PARTNER (see CONNECTED FIRMS) —

- actions between firms with, 267, 569.
- adjudications of bankruptcy in cases where, 638, 641.
- creditors of firms with, how treated on bankruptcy, 696.
- proof of debts against firms with, 724.

COMMON STOCK —

not essential to partnership, 12, 13.

COMMUNITY —

of loss, 10.

of profit, 12. See PARTNERSHIP; PROFITS; LOSSES.

COMPANIES —

distinguished from partnerships and corporations, 4, 5.

incorporated, 5.

unincorporated, 5.

illegal. See ILLEGAL PARTNERSHIPS.

promoters of, not partners, 23, 24.

subscribers to inchoate, not partners, 24.

banking, 95, 96 and note (2).

may be partners, 78.

may be petitioning creditors, 633.

when subject to bankruptcy law, 623.

whether dissolved by bankruptcy of members, 649.

proof of debts by, 707.

proof by against estate of shareholder, 739.

COMPANIES ACT, 1862 —

club need not be registered under, 50.

may be wound up under, 50, note (i).

COMPENSATION —

for trouble, 380. See CONTRIBUTION.

for services, does not constitute one a partner, 13, 22.

COMPETITION —

by one partner with firm not allowed, 312.

remedy of partners in case of, 312.

COMPOSITIONS IN BANKRUPTCY —

generally, 754.

joint, effect of, on separate liability, 238.

relation back of trustee's title in, 755.

registration of, 756.

COMPOUND INTEREST —

in case of bankers, when payable, 390, note (s).

liability to account for, 531. See INTEREST.

COMPROMISE —

power of one partner to bind firm by, 136.

CONCEALING NAME —

and yet holding out, 42.

CONCEALMENT —

when a fraud, 480, and note (m).

of firm name, effect of, on doctrine of holding out, 45.

CONDITIONAL —

offer to take shares, 24.

CONDITIONS —

what are precedent and what not, 416.

contracts of partnership on, 20 *et seq.*

in partnership articles. See ARTICLES OF PARTNERSHIP.

## CONDUCT —

- of partners, agreements as to, 418.
  - effect of as regards rights of copartners, 116, 117, 267-270.
  - See, also, HOLDING OUT.
- misconduct when a ground for dissolution, 466, 580. See INJUNCTION; DISSOLUTION.
- of proceedings, where joint and separate creditors actions, 598, note (*n*).

## CONFIDENCE —

- destruction of, a ground for dissolution, 580.

## CONNECTED FIRMS (see COMMON PARTNER) —

- actions between, 267, 569.
- notice to one when notice to both, 141.
- adjudication of bankruptcy against, 637.
- creditors of, regarded as separate creditors, 693.
- proof by one against the other in bankruptcy, 724.
- double proof against, in the event of bankruptcy, 748.
- action against, not necessarily multifarious, 603, 604.
- liability of, on each other's bills, where name is the same, 181 *et seq.*

## CONSENT —

- to retirement of partner from firm, 573.
- to transfer of share, 363.
  - necessity of, 363.
  - how given, 364, 365.

## CONSIDERATION —

- of a contract of partnership, 63. Book I, cap. II.
- of the recovery back of premiums, 64.
  - in cases of fraud, 64.
  - where the consideration has failed, 65.
  - where no time was fixed for the continuance of the partnership, 66.
- for discharge of old partner, 242.

## CONSOLIDATION (see AMALGAMATION) —

- of joint and separate estates in bankruptcy, 695.
- of proceedings in bankruptcy, 638, 643.

## CONSTRUCTION —

- of partnership articles, 406 *et seq.* See ARTICLES OF PARTNERSHIP.

## CONTEMPLATED —

- partnerships, 20 *et seq.*

CONTINUATION OF PARTNERSHIP, 121 *et seq.*

- effect of, on application of partnership articles, 410, 411.
- as regards the duration of sub-partnership, 122.

## CONTINUING PARTNERS (see SURVIVING PARTNERS) —

- promise to look to, effect of on discharge of retired partner, 242.
- treating as sole debtors, 243.



## CONTRACTS —

- of loan, how distinguished from partnerships, 15 and Add.
- of partnership, 10 *et seq.* See PARTNERSHIP.
  - evidence of, 80 *et seq.*
  - how created and how dissolved, Book I and Book IV.
  - unconcluded, 19.
  - conditional, 20.
  - formal, to be drawn up, effect of on commencement, 413.
  - consideration of, 63.
  - disabilities created by, 116, 624.
  - proof of, 80 *et seq.*
  - duration of, 121 *et seq.*, 413.
  - rescission of, 479, 482.
  - specific performance of, 475.
  - dissolution of, 570 *et seq.* See DISSOLUTION.
  - part performance of, 83.
  - construction of. See ARTICLES OF PARTNERSHIP.
- by and with partners.
  - liability on, 176.
    - when under seal, 177, 273.
    - when not under seal, 177. See, too, BILLS OF EXCHANGE and PROMISSORY NOTES.
    - when firm is not named, 178.
    - not joint and several, 192 *et seq.*
    - remedy on against assets of deceased partner, 192, 193.
    - when confined to the funds of the firm, 201.
  - conduct of one partner a defense, 116, 267, 268.
  - effect of change of firm on, 284.
  - form of, 176, 179.
  - who to sue on, 274, 275.
  - when firm cannot sue on, 282.
  - effect of having had benefit of, 189 *et seq.*
  - through an agent, who to sue on, where there has been a change amongst the partners, 286.
- power of partner to enter into, 134.
- power of partner to vary, 134.
- actions by or against partners on. See ACTIONS.
- action for breach of express, between partners, 563.
- when required to be signed, only binds partners who sign, 179.
- and torts, distinction between, 198, 199.
- pending by partnership, how dealt with on dissolution, 558.
- distinct, double proof in bankruptcy in respect of, 748.
- ratification of, 371, 388.

## CONTRIBUTION —

- foundation of right to, 367 *et seq.*
- right to, excluded by —
  - agreement, 369.
  - fraud, 369.
  - disobeying instructions, 370.
    - application of this doctrine to directors, 368, note (*f*).
  - gross negligence, 378, 387.
  - illegality of transaction, 104, 372, 377.
- agent's right to from his principal, 369.
- self-constituted agent's right to, 372, 373.
- trustees' right to, 373, 374.
- co-owners, no right to, 60.

## CONTRIBUTION (continued)—

partners' right to—

generally, 369.

in respect of—

services performed for firm, 380.

after dissolution, 381.

in India, 381.

outlays and advances, 381. See ALLOWANCES.

debts, liabilities and losses, 385.

when attributable to one partner rather than to another, 386.

when attributable to one partner's misconduct or negligence, 387.

when attributable to acts done *bona fide*, but without authority, 386.

when firm has adopted them, 388.

illegal transactions, 377, 388, note (g).

actions at law between partners for, 564, 566.

difference formerly between law and equity, as to, 374 *et seq.*

as to indemnity before loss has been sustained, 375. And ADD.

amount payable by each contributory, 376.

as to contribution, when some of the contributories are insolvent, 376, 741.

liability of estate of deceased partner to, 211, 262.

between wrong-doers, 377.

See INDEMNITY.

## CONVERSION —

by one tenant in common, 59.

of share of deceased partner, when it is bequeathed for life, 615, 620.

of joint estate into separate, by partnerships, and *vice versa*, 334 *et seq.*, 697.

agreements for, when not binding, 698 *et seq.*

if fraud, 698.

if executory, 698.

if lien of parties is to continue, 699.

evidence of, 700.

effect of reputed ownership on, 700.

holding out on, 700.

of joint debts into separate, and *vice versa*, 703.

of partnership property, effect of fraudulent, on right of proof in bankruptcy, 724.

of realty into personalty, 343 *et seq.*

in cases of partnership for fiscal purposes, 347 and note (a).

doctrine as to, does not apply to co-owners, 347.

may be prevented by agreement, 346.

## CONVEYANCE —

when act of bankruptcy, 631.

See DEED; FRAUDULENT CONVEYANCE.

## CONVICTS —

cannot be members of a partnership, 71.

administrator of property of, 74.

to what extent disabled, 74.

## CO-OWNERS —

- not copartners, 51.
- joint purchasers of goods, 53.
- part owners sharing the produce of their property, 17, 18, 53, 347.
  - profits, 18, 331.
  - gross returns, 18.
- when common property to be considered partnership property, 18, 331 *et seq.*
- co-ownership and copartnership compared, 52.
- doctrine of conversion does not apply to, 347.
- of land, 58, 331–333.
- of mines, 54.
- of patents, 62.
- of copyrights, 62.
- of race-horses, 18, 51.
- of ships, 60. See SHIPS.
- of newspapers, 364, note (*u*).
- admissions of, 128, note (*l*).
- lien of, 57, 60, 355.
- remedies of, *inter se*, 57–62.
- receivers appointed for, when, 548.

## CO-OWNERSHIP —

- and copartnership compared, 52.

## COPARTNERS AND COPARTNERSHIP. See PARTNERS; PARTNERSHIP.

## COPYRIGHT —

- registering in name of partners, 112, 115.
- rights of co-owners of, 62.
- indivisibility of, 62, note (*k*).

## CORPORATIONS (see INCORPORATION) —

- distinguished from partnerships and companies, 4 *et seq.*
- persons when, 6, note (*d*).
- may be in partnership with individuals, 78.
- may petition under Bankruptcy Act, 633.
- presuming to act as, 93.
- name of, may be a trade-mark, 114, 115.

## COST BOOK MINING COMPANY —

- shares in, how far real estate, 348.
- liability of shareholders in, for goods supplied to the mine, 133.
  - for money borrowed, 133.
  - See, also, MINES.

## COSTS —

- costs of trustees in bankruptcy, how paid as between joint estate, 694.
  - separate estates, 694.
- of action for dissolution, 517; on ground of lunacy, 579.
  - account, 517.
- of administration action by separate creditor paid in priority to joint creditors, 612, 613.
- one partner bound to indemnify firm against, if he sues in its name, 271.
- indemnifying trustee against, when solvent partners sue, 289.
- firm liable for, in cases of breach of trust, 161.

## CO-SURETIES. See SURETIES.

## COUNTER-CLAIM —

what may be set off in, 290.

## COURT —

administration of deceased partner's estate by, protects executors, 594.

## COURT IN BANKRUPTCY —

jurisdiction of, to ascertain share of deceased partner, 649.

## COVENANTS —

liability of partners on, 177.

in the case of retired partners, 243.

what are joint, and what are several, 280.

with one partner on behalf of firm, 277.

liability several as well as joint, when, 193, 437, note (o), and ADDENDA.

actions by partners on, 273.

one partner against another on, 563.

when firm cannot sue on, 277.

set-off in actions on, 290 *et seq.*

not to carry on business, 436, 437, note (o).

not to sue,

partner may join in suing notwithstanding, 270.

when not equivalent to a release, 237.

to pay out of funds of partnership only, effect of, 201.

## CREDIT —

of firm, destruction of, not *per se* a ground for dissolution, 581.

See BORROWING MONEY.

## CREDITOR —

meaning of the phrase a partner is a creditor of, or a debtor to, his own firm, 110.

of firm not a separate creditor of members, 198, etc. See DEBTS. joint and separate. who is, 701 *et seq.*

secured, position of, in the case of the bankruptcy of the debtor, 714, 749.

of firm has no lien on its property, 334.

petition by, for adjudication of bankruptcy against partners, 633 *et seq.*

rights of —

against partners,

dormant partners, 125, 192, note (d), 212. See DORMANT PARTNERS.

the estate of a deceased partner, 594 *et seq.*

See, also, DECEASED PARTNER; EXECUTORS; LIABILITY.

of a bankrupt partner, 729. See BANKRUPTCY.

of bankrupt firm, 720, 743.

incoming partners, 205 *et seq.*

quasi-partners. See QUASI-PARTNERSHIP; HOLDING OUT. retired partners, 223 *et seq.*

See RETIRED PARTNER; LIABILITY.

surviving partners, 602. See SURVIVING PARTNERS.

effect of dissolution of partnership on, 134, 586.

not affected by agreements between partners, 239. See NOTICE.

of deceased partner, to an account, 494.

conflict of different classes of creditors, 598.

## CREDITOR (continued) —

rights of —

loss of rights of —

by payment, 225 *et seq.* See APPROPRIATION OF PAYMENTS.

by dealings with the continuing partners, 242, 253.

by dealings with the surviving partners, 229.

by merger of debt, 254 *et seq.*, 703.by lapse of time, 257 *et seq.*, 597. See LIMITATIONS, STATUTE OF.

by release, 237.

by substitution of debtors and securities, 239 *et seq.*

## CREDITORS' DEED, 756 —

trustees of, not partners, 30.

assent of one partner to, 135.

by partners, 631.

by one partner for creditors of firm, 631.

## CRIME —

partnership for sharing profits of, 93, and note (*n*).

liability of partners for, 150.

## CRIMINAL LAW —

remedy of one partner against another, 456, 457.

## CRIMINAL PROSECUTION —

of partner, ground for dissolution, 582.

## CROSS-BILL —

when necessary, 506, note.

## CROWN —

prerogative of, as regards shares, in partnership, 340, 583, note (*t*).

## CUSTODY —

of books of firm, agreements as to, 420. See BOOKS.

## CUSTODY OF FIRM —

misapplication of money in, consequence of, 150-162.

## CUSTOMERS —

allowance for treating, 383.

right to solicit old, 440, and note (*g*).

See DISSOLUTION AND NOTICE.

## CUSTOMS —

of merchants as to payment of interest, 389.

of trade, effect of on reputed ownership, 677, note (*y*).rendering agent personally liable, 177, note (*m*).illegal, unknown to principal, effect of, 370, note (*l*), 372, note (*t*).

## DAMAGE —

to firm, when necessary to support action by it, 278.

## DAMAGES —

as to actions between partners for, 561.

may be set off against debts, 658.

what fraud sufficient to support an action for, 479, 481.

unliquidated, when not provable in bankruptcy, 707.

action for account not dismissed because plaintiff entitled to, 458.

co-owners no right of action for by way of contribution, 60.

## DATE—

- of dissolution in cases of lunacy, 579.
- misconduct, 579.
- other cases, 572.

See COMMENCEMENT.

## DEALINGS—

- with one partner only, 179.
- bona fide* with bankrupt partner, 681.
- with solvent partner, 671.
- by creditors with continuing partners, effect of, on rights against retired partners, 242 *et seq.*
- by one partner with his copartner, 305.

## DEATH OF PARTNER—

- dissolution of partnership by, 590 *et seq.* See the Analysis of Contents, Bk. IV, ch. 3, and *infra*, DECEASED PARTNER, EXECUTORS, SURVIVING PARTNERS, DISSOLUTION.
- effect of, on adjudication of bankruptcy, 637, 638.
- on right to sue, 288.
- 1. As between partners, 590.
- works dissolution, 590.
- return of premium in case of, 67.
- accounts on, 514.
- position of executors of deceased partner, 590, 593.
- surviving partners, 591.
- account of subsequent profits, 521 *et seq.*, 593.
- making copartner executor, 593.
- succession duty on, 594.
- effect of as regards good-will, 443.
- 2. As regards joint creditors, 211.
- position of executors of deceased as regards creditors of firm, 211, 594.
- tabular view of cases showing where estate of deceased partner discharged, and where not, 595-597.
- administration of deceased partner's estate by creditor, 598.
- rights of joint and separate creditors contrasted, 598.
- form of order for administration by creditor, 600.
- personal liability of executors, 593, 604.
- liability of assets by acts of testator, 605.
- direction by will to carry on trade, 606.
- trust to carry on business, 607.
- amount of assets liable, 609.
- right of creditors to stand in place of executors, 606, 607.
- 3. As regards separate creditors, legatees, etc.
- separate creditors, legatees, etc., must look to executors, 610.
- surviving partners not proper parties, 611, 612.
- account between executor and surviving partner, 613, 614.
- arrangements between executor and surviving partner, 614.
- rights when share of deceased not got in, 614.
- interest and profits, 615.
- profits made since death, 527, 616.
- accounts of, when ordered, 616, 617.
- when refused, 617.
- executors continuing business, 614.
- specific bequests of shares, 619.
- tenant for life under, 620, 621.
- duty of executors to sell shares, 620.
- loans by executors, 618.
- executors becoming partners, 618.

**DEBENTURES —**

not within doctrine of reputed ownership, 678.

**DEBTOR —**

partner in what sense debtor to firm, 110, 401.

substitution of, effect of on liability of firm, 239 *et seq.*

**DEBTS —**

of partnership, effect of, on its duration, 121.

payment of, out of assets of deceased partner, 194, 195, 196.

to one partner, 134.

after dissolution, 134.

to bankrupt partner, 668.

of debt not due to firm, 134.

by taking bill in payment, 136.

release of, by one partner, 135, 137.

receipt for, by one partner, 135.

by surviving partner, 234.

transfer of, assent of one partner to, 135.

one partner taking shares as security for, 141.

one partner settling, 136.

promise by one partner to pay, 136.

tender of, to one partner, 136.

liability of partners for. See CREDITOR; LIABILITY.

extinction of by doctrine of merger, 254 *et seq.*, 703.

by payment, 225 *et seq.* See APPROPRIATION OF PAYMENTS.

by release, 237 *et seq.* See RELEASE.

by substitution of debtors, 239 *et seq.*

by lapse of time, 257 *et seq.*, 508, 597. See LIMITATION, STATUTES OF.

by discharge of bankrupt, 752.

by arrest, 238.

of partnership, when joint and several, 193, 199.

claim for against assets of deceased partner, 192, 193.

set-off of, 290. See SET-OFF.

buying up, at less than nominal value, effect of —  
in bankruptcy, 663.

assignment of, effect of, as regards set-off, 291.

to continuing partners, 450.

may now be made, 285.

assignee of, may sue, when, 285, 652.

right of partner to insist on payment of, 351, 352, and note (g).

agreement by partner to bring in good, 417.

guaranty against, given to incoming partner, 418.

agreements as to getting in, 448.

right of solvent partner to get in, 670, 671.

in what cases new partner may join in action for, 285.

application of doctrines of reputed ownership to, 678, 679.

order in which joint and separate are paid, 598, 709, and note (z).

what are joint and what are separate, 701. See JOINT DEBTS.

separate. See SEPARATE DEBTS.

proof of in bankruptcy, 707. See BANKRUPTCY.

when sufficient to support bankruptcy petition, 634.

vest in trustee in bankruptcy, 652.

**DECEASED PARTNER —**

actions against estate of, parties to, 460.

assignment of share of by executors, 450.

## DECEASED PARTNER (continued) —

- administration of estate of —
  - by the surviving partners, 591.
  - by creditors of the firm, 598.
  - by the separate creditors, legatees, or next of kin, 610.
  - adjustment of the conflicting rights of creditors in action for, 598.
  - joint and separate creditors, 598.
  - secured creditors, 602.
- form of order for, 600.
- effect of judgment for, on right to sue surviving partners, 195, 603, 612.
- set-off in, 291 *et seq.*
- account of assets of —
  - where they have been improperly employed in trade, 606, 724.
  - right to, by separate creditors and legatees, 494.
  - where share of deceased not got in, 614.
- appointment of a representative of, 591.
- liability of survivors for assets of, 614.
- liability of estate of —
  - to creditors of the firm, 195, 594.
    - in respect of what occurred before death, 594.
    - in respect of what occurred after death, 604.
    - table of cases, 595-597.
  - where assets have been continued in the partnership business,
    - by direction of deceased, 606 *et seq.*, 722.
    - where no direction, 617, 724.
    - in case of bankruptcy, 722, note (g).
  - after judgment against the surviving partners, 194, 257.
  - notwithstanding the statute of limitations, 262.
  - for torts, 595.
- discharge of estate of, from debts of firm —
  - by appropriation of payments, 229. See APPROPRIATION OF PAYMENTS.
  - by statute of limitations, 597.
  - by dealings with the surviving partners, 249, 596.
    - none where dealings induced by fraud, 252.
- specific performance of agreements relative to share of, 432.
- executors of, may be joined as defendants with survivors, when, 288, 460, 598, 603.
- rescission of contracts relating to his share, 487, 488, and note (n).
- where executors partners, 488.
- where they are not, 487.

See DEATH; EXECUTORS; SURVIVING PARTNERS.

## DECEIT —

- action for damages for, 162.
- distinguished from other actions based on fraud, 163.
- See FRAUD.

## DECREE —

- for dissolution of partnership, 516.
  - in case of lunacy, 577.
- for the administration of the estate of a deceased partner, 600.
- for partnership account, 516.
- See ACCOUNT; DISSOLUTION; JUDGMENT; ORDER.

## DEED —

- one partner has no authority to bind firm by, 136, 137.
- necessity of, to dissolve a partnership created by deed, 572.



**DEED (continued) —**

- not necessary to prove partnership, 87.
- who can sue on, 177.
- effect of removing seal from, 238.
- of partnership, general rules for construction of, 403 *et seq.*
  - power to vary, 409.

**DEFENSE —**

- to actions by partners, founded on conduct of one partner, 116,
  - 117.
  - alteration in the law as to, by the Judicature Acts, 267 *et seq.*
- to actions for an account and discovery, 506.
  - accord and satisfaction, 515.
  - account stated, 512.
  - award, 514.
  - denial of partnership, 507.
  - payment, 515.
  - release, 516.
  - statute of limitations, 508.
  - laches, 466 *et seq.*
  - illegality, 105.
  - waiver, 516.

**DEFINITIONS —**

- of partnership, 2 *et seq.*

**DELAY —**

- of plaintiff, when a bar to relief, 467. See **LACHES**; **LIMITATIONS**, **STATUTE OF**.

**DEMURRER —**

- laches could not be taken advantage of by, 475.

**DENIAL OF PARTNERSHIP —**

- effect of, in action for account and discovery, 596.
- as regards the appointment of receiver, 552.

**DEPOSIT OF DOCUMENTS —**

- effect of, as regards the doctrines of reputed ownership, 678. See **EQUITABLE MORTGAGES**.

**DESTRUCTION OF ACCOUNTS —**

- consequence of, in taking accounts, 405.

**DEVASTAVIT —**

- by executor, proof for, 738, note (j).

**DEVISEES —**

- of land, and trade carried on on it, how far partners, 332, 333.

**DEVOLUTION —**

- of partnership property, 341.
  - legal estate in land, 341.
  - choses in action, 341.
  - chattels, 342.
  - good-will, 342.

**DIRECTION —**

- by deceased partner to carry on trade, effect of, 610.

**DIRECTORS —**

- liability of, for work, etc., done by their authority, 45.
- checks drawn by, 133, note (d).
- right of, to contribution, 375.

**DISABILITIES —**

- of partners, 116, 117, 268.
- under bankruptcy law, 624.

**DISCHARGE —**

- by one partner, effect of, 134, 135.
- from liability. See **LIABILITY**.
- of bankrupt. See **CERTIFICATE AND ORDER OF DISCHARGE**.

**DISCLAIMER —**

- by trustee of bankrupt's onerous property, 651.

**DISCLOSURE —**

- duty of partner to make, to copartners, 305 *et seq.*, 306.

**DISCOVERY (see INSPECTION) —**

- of partners where name of firm is used, 265.
- right of partner to, 501.
- in actions for account, 404, 501.
- defenses to actions for, 506.
  - accord and satisfaction, 515.
  - account stated, 512.
  - award, 514.
  - waiver, 516.
  - denial of partnership, 507.
  - release, 516.
  - statute of limitations, 508.
  - laches, 466.
  - illegality, 102.
- where right to depends upon a preliminary question, 507, 508.
- by unlicensed brokers, 97.

**DISCRETION —**

- power of partner to act on his own, 127.
- as to joining firm, 20, 433, 555. See **OPTION**.
- of court —
  - as to interfering between partners, 464 *et seq.*
- See, also, **INJUNCTION**; **SPECIFIC PERFORMANCE**.

**DISPUTES —**

- between partners, etc., mode of settling, 313. See **MAJORITY**.
- where they relate to ordinary business, 314.
- where they relate to a change in the nature of the business, 315.
- all partners entitled to be heard, 315.
- as to internal matters, courts do not interfere, 466.

**DISSENTIENTS —**

- powers of, 315. See **MAJORITY**.
- retirement of, 317.
- offer of indemnity to, 318.

**DISSOLUTION —**

- actions for, 461, 491 *et seq.*
- parties to, 459 *et seq.*
- next friend of lunatic may bring, 579.
- should be brought in chancery division, 491.

## DISSOLUTION (continued) —

## actions for —

how statement of claims should be framed, 491.

where partnership is at will, 491.

where partnership may be wound up under the Companies Act, 401.

not seeking, rule as to granting relief in, 464 *et seq.*

parties to, 462, 463.

for share of assets after a, 569.

causes of, 570 *et seq.*

will of any partner, 571.

unless no right of, under agreement, 10, note (e).

impossibility of going on, owing to —

the hopeless state of the partnership business, 576.

the lunacy of one of the partners, 577.

misconduct, etc., 580.

death, 586 *et seq.* See DECEASED PARTNER.

retirement, 573.

expulsion, 574.

transfer of interest, 583, viz. :

by the assignment by one partner of his share in the partnership, 363, 583.

by the taking of a share in execution under a *fi. fa.*, 359, and note (d), 583.

by bankruptcy, 577, 583. See BANKRUPTCY.

of one partner, 649, 666.

formerly by marriage of female partner, 583.

the occurrence of some event which renders the continuance of the partnership illegal, 585.

war, 585.

## contracts of, 122.

## notice of.

importance of giving, 213, 214.

each partner has a right to give, 214.

how to be given, 222.

what amounts to, 221 *et seq.*, 571.

insufficient notice of, 426.

effect of, 215.

as regards the doctrines of reputed ownership, 680.

as regards future acts, 210 *et seq.*

injunction against circulating, 539.

## time from which dates, 572.

in case of lunacy, 579.

in case of misconduct, 582, 583.

## consequence of, 114, 586.

as regards past acts, 240.

future acts, 210.

return of premium, 65. See PREMIUM.

apportionment of premium, 64 *et seq.*

lien of solicitors, 120.

actions by and against the firm, 284.

getting in debts, 448, 669.

conversion of joint into separate property, 336.

creditors, 586.

when they agree to look for payment to continuing partners only, 241.

partners, 587.

right to carry on business, 437.

bills indorsed after, 213, 214, 673.

## DISSOLUTION (continued) —

- consequence of —
  - as regards torts, 214.
  - property acquired after, 326.
  - articles, 410.
  - pending contracts, 558.
  - payment for services rendered after, 381.
- how far a partnership continues after, 217.
- deed not necessary on, 572.
- award on submission of all matters in difference, 426.
- agreements as to, 425. See ARTICLES OF PARTNERSHIP.
- driving a partner to, 497, 575.
- provision for, in case of insolvency, 425.
- injunctions in actions for, 491, 541. See INJUNCTION.
- rescission of agreements made on, 484.
- receivers, appointment of, in actions for, 547 *et seq.* See RECEIVER.
- accounts on, 421, 518 *et seq.*
- account without, 494 *et seq.* See ACCOUNT.
- of profits since, 326, 521.
- sale of partnership property on, 555.
- valuation of share on, 429.
- stamp on assignment by outgoing partner, 450.
- clauses in deeds as to, 425.
- part payment by continuing partner after, effect of, 263.
- of company by bankruptcy of shareholder, 649.

## DISTANCES —

- measurement of, 437, note (o).

## DISTINCT CONTRACTS —

- double proof in respect of, 748.

## DISTINCT TRADES —

- effect of carrying on as regards proof in bankruptcy —
  - by a separate estate against a joint estate, 725.
  - by a joint estate against a separate estate, 736.
  - by a creditor in both trades, 747, 748.

## DISTRESS —

- in name of firm, 137.
- on partnership goods for rent due from partners separately, see *Ex parte Parke*, 18 Eq. 381.

## DIVIDENDS —

- payment of, out of capital, 394, note (e).
- apportionment of, 621.
- declaration of, in bankruptcy, 693.
- See PROFITS.

## DIXON —

- his definition of partnership, 2.

## DOCUMENTS —

- proof of partnership by informal, 85.
- production and inspection of, in actions, 501. See PRODUCTION OF DOCUMENTS.

## DOMAT —

- his definition of partnership, 2.

## DOMICILE —

- of partnership and partners, 5, 72.
- effect of, on partnership in case of war, 72, 73.

## DOORS —

- names on, evidence of partnership, 89.

## DORMANT PARTNER —

- liabilities of, 16, 43, 125, 192, note (*d*), 213, n.
  - on written contract, 178.
  - on contracts in which he is not named, 45, 212, 275, note (*s*).
- authority of, 125.
- position of, and that of mere lender, compared, 16.
- who is not, 212, note (*h*).
- effect of retirement of, 212.
  - where continues to hold himself out, 216.
- notice of retirement of, when necessary, 213.
- discharge of, by doctrine of appropriation of payments, 229. See **LIABILITY**.
  - by substitution of debtors, difficulties of, 245.
- when to sue with others, 276.
- actions against, 281.
- set-off in actions by and against, 294.
- may be made bankrupt, 633.
- may be included in joint adjudication, 631.
- how affected by doctrines of reputed ownership, 689.
  - when dead, 691.
- how affected by judgment against copartners, 255, note (*s*). And **ADDENDA**.

## DOUBLE PROOF —

- by principal and surety, effect of, 719.
- rule against, 719, 743.
- when allowed, 747.
- election in case of, 743.
- when creditor holds security, 749.

## DRAFT —

- of agreement evidence of partnership, 89.

## DRAWINGS —

- monthly, agreements as to, 418.

## DURATION —

- of partnership, 121 *et seq.* See **DISSOLUTION**.
- agreements as to, 413.
- after dissolution, 217.
  - effect of, on partnership articles, 410.
- effect of taking lease, 121.
  - outstanding debts, 121.
- after term has expired, 122.
- implied terms of, 122.
- of liability, 201 *et seq.* See **LIABILITY**.
- commencement of liability, 201.
  - of firm for acts of incoming partner, 202, 203.
  - of incoming partner for acts of firm, 205-207.
  - of promoters of companies, 45, 206.

**DURATION (continued) —**

of liability —

termination of liability, 210.

as to future acts, 210.

by death, 211.

by bankruptcy, 212. See **BANKRUPTCY**.

by retirement of dormant partner, 212.

by dissolution of partnership, 213.

as to past acts, 223.

by payment, 225.

release, 237.

substitution of debtors and securities, 239.

merger, 254.

lapse of time, 257.

**DUTIES —**of partners generally. See **ANALYSIS OF CONTENTS**, Bk. III.*inter se*, 303, 304.

not all to be found in partnership articles, 406.

See, also, **PARTNERS**.**EJECTMENT —**

by partners, 279.

by one partner against another, 328, note (f), 562.

by one co-owner against another, 58.

**ELECTION —**

formerly between action and proof in bankruptcy, 718.

between proof against joint or separate estates, 743.

when made conclusive, 745.

when not deemed to have been made, 746.

by petitioning creditor, 747.

**ELECTION, PARLIAMENTARY —**right of partner to vote at, in respect of partnership property.  
348.**EMBEZZLEMENT —**

by servants sharing profits, 13, note (r), 457, note (a).

by partner, 457.

**ENEMY —**

partnership for trading with, illegal, 73, 92.

**ENGRAVINGS —**

registration of, under name of firm, 113.

**EQUALITY —**

of shares in partnership, 348, 349.

of profit and loss but not of capital, 403.

**EQUITABLE MORTGAGES —**

for advances. effect of change of firm on, 119, 120.

given by one partner on behalf of firm, 140.

may be created or extended by parol, 119, 120, 715.

how they affect right to prove in bankruptcy, 714.

observations on, 715.

how affected by doctrine of reputed ownership, 678.

**EQUITY —**

- differences, between rules of law and, as regards contribution and indemnity, 374.
- difference between rules of, and bankruptcy as regards secured creditors, 602.
- remedy in, in respect of money of which the benefit has been had, 191.

**EQUITIES OF REDEMPTION —**

- not within doctrine of reputed ownership, 678.

**ESTATE —**

- of deceased partner. See DEATH; DECEASED PARTNER; EXECUTORS.
- of bankrupts. See BANKRUPTCY.

**ESTOPPEL —**

- by holding oneself out as partner, 40.
- discharge of retired partner by, 249.

**EVICTIOIN —**

- annuity payable until, 436.
- See EJECTMENT.

**EVIDENCE —**

- that a person is a partner or *quasi*-partner, 80 *et seq.* Bk. I, cap. 4.
- what has to be proved, 83.
- usual means of proof, 84, 89, 90.
- effect of the statute of frauds, 80.
- where there is no writing, 80, 84.
- acts of alleged copartner, 85.
- admissions, 87.
- articles of partnership need not be proved, 87.
- of future partnership, 80.
- retrospective articles, 88.
- of lunacy, 578.
- upon which partnership accounts are taken, 536.
- partnership books, 536.
- banker's books, 537, note (t).
- See, also, LIABILITY; PROOF OF DEBTS; NOTICE.

**EXCISE LAWS —**

- illegality of partnerships infringing, 95, 99, note (s).
- effect of breach of, by one partner, 149.
- contribution in case of breach of, 378.

**EXCLUSION —**

- from management of partnership business, 301.
- agreements as to, 10, 302.
- injunction in case of, 543.
- receiver in case of, 551.
- account in case of, 496.
- from share of profits, 395.

**EXECUTION —**

- against a partner for a separate debt, 356.
- duty of the sheriff, 356.
- sheriff seizes the partnership property, 356, 357.
- sale of execution debtor's share, 358.
- may be by private contract. 358.

## EXECUTION (continued) —

- against a partner for a separate debt —
  - rights of the other partners, 358.
  - interpleader by sheriff, 358, note (*q*). 362.
  - since the Judicature Acts, 361; form of order, see *Seton on Decrees*, 1214, edition 4.
  - action against sheriff by solvent partner, 568.
  - position of the purchaser from the sheriff, 358.
  - position of the execution debtor, 359.
    - creditor, 361.
  - purchase of interest by his copartners, 360.
  - dissolution of partnership by, 359, note (*d*), 583.
  - injunction in cases of, 359.
  - receiver in cases of, 359.
- against partners for their joint debt, 192, note, 298 *et seq.*
- against whom it may issue when judgment against firm, 299, 300.
- against what property, 300.
- where there is a receiver, 300, 554.
- where alleged debtor abroad, 300, note (*f*).
- benefit of belonging to trustee in bankruptcy, 654, 675.
- when levied by seizure and sale not invalid as act of bankruptcy, 665, 675.
- seizure by sheriff protects creditor, 709, note (*b*).
- See EXEMPTION.

## EXECUTION CREDITOR —

- conflicting rights of, and trustee in bankruptcy, 674.
- See EXECUTION.

## EXECUTORS —

- of a deceased partner —
  - do not become partners, 590.
  - unless express agreement to that effect, 590.
- liabilities of, 591.
  - to surviving partners, 591.
  - to creditors of the firm, 594 *et seq.*, 604.
    - as regards what occurred in the life-time of the testator, 594, 595, 603.
    - as regards what has occurred since the testator's death, 604.
    - by sharing profits with surviving partners, 604, note (*l*).
    - by carrying on business with the assets of their testator, 604 *et seq.*
      - where direction to carry on trade, 606.
      - trust to carry on business, 607.
    - liability to be made bankrupt, 593.
  - to the separate creditors, legatees and next of kin of the deceased, 610.
    - where partnership was illegal, 108.
      - the asstes of the deceased are not got in, 614.
      - they are the surviving partners, 528 *et seq.*, 614.
      - they enter the firm, 618.
      - wilful default, 612.
  - duty of, to convert share into money, 593, 620.
  - rescission of contracts between executors and surviving partners, 487 *et seq.*
  - effect of part payment by, as regards the statute of limitations, 262.



**EXECUTORS (continued) —**

of a deceased partner —

injunction against, 542.

account stated with, 613.

actions by and against, 288, 461, 612.

parties to, 288, 461, 612.

allowances to, in India, 381.

illegality set up by, 108.

loans by, to surviving partners, 615, 618.

receiver appointed against, 548.

cannot prove in bankruptcy against surviving partners, when, 722.

rights of —

as regards surviving partners, 593.

where they are surviving partners, 593, 614.

to interfere with surviving partners, 591.

to account, 493, 591.

to compel proper appropriation of payments, 591.

to have the assets sold, 592, 593, 620.

as regards good-will, 443, 592.

to account of profits made since their testator's death, 521 *et seq.*, 592, 616 *et seq.*

to compensation for trouble, 592.

to indemnity, 594, 607.

extent of indemnity, 609.

to retain balance due on the partnership account, 490.

agreement with, is with those who prove, 19, note (z).

See DEATH; DECEASED PARTNER.

**EXECUTORY AGREEMENT —**

not sufficient to convert joint into separate estate, 337, 698.

**EXEMPTION —**

of property from execution, 358, note.

**EXPULSED PARTNER. See EXPULSION.**

**EXPENSES —**

of forming company, liability of promoters for, 385.

of trustee in bankruptcy when paid out of joint estate, 694, 720.  
note (r).

separate estates, 694.

of managing partner, 380, and note (n).

right of partner to charge for, 381, 382, note (y).

no allowance in respect of, unless actually incurred, 384.

to be charged to the firm, agreements as to, 418.

action between partners for not contributing to, 564.

See, also, CONTRIBUTION.

**EXPULSION —**

of partner, 574.

exercise of powers of, 411, 426, 427, 575.

provisions in articles as to, 426, 427.

agreements made on, when void, 486, 487.

**EXTENSION OF BUSINESS —**

power of partners as to, 137, 315 *et seq.*

**EXTENT —**

sale of share under, 340.

**EXTRAORDINARY NECESSITY —**

power of one partner to bind firm in cases of, 126.

See IMPLIED POWERS.

FACTORS' ACTS, 140, 141.

FALSE ACCOUNTS —

rendered by one partner, 165. See ACCOUNTS.

FALSE STATEMENTS —

rescission of contract for, etc., 479, 482. See FRAUD.

by one partner, liability of firm for, 162 *et seq.*

actions for, 481.

FARMERS —

accounts between, 59.

sharing profits when partners, 332, 333.

one of a firm of, has no power to bind others by bills, 131.

FELONS —

partners who are, 73, 74.

partnership between, 93, note (n).

FI. FA.—

sale of partner's share under, 340, 356 *et seq.*

dissolves the partnership, 583.

See EXECUTION.

FIRM —

mercantile and legal view of, 110 *et seq.*

consequence of difference, 112.

in what sense a debtor to or creditor of its own members, 110, 401.

name of, 112. See NAME.

should be expressed in the articles, 413.

partners may be registered as shareholders in, 112.

as owners of copyright, 112, 113.

a trade-mark, 114.

mistakes in, 115.

how described in legal instruments, 112.

each partner the agent of, 124. See IMPLIED POWERS.

actions by and against.

general remarks on, 115, 273.

may be brought in name of, 112, 265. See ACTION.

formerly could not sue or be sued by one of its own members, 115.

at law, by another firm, if one partner was common to both, 115, 116.

conduct of one partner, when a defense to an action by him and his copartners, 116, 117.

legacy to, 113.

advances to, by trustees, 113.

may act in bankruptcy by one of its members, 624.

proof of debts due to, 707.

changes in, effect of, 113, 117. See CHANGES.

as regards set-off, 297.

sureties and securities, 117, 118.

equitable mortgages, 119.

solicitors' lien, 120.

actions, 284.

two firms —

with common partners. See CONNECTED FIRM; COMMON PARTNER.

actions between, 115, 116.

proof in bankruptcy when one contains another, 726.

with same name, liabilities of on each other's bills, 181.

See PARTNERSHIP; DISSOLUTION.

- FIXTURES** —  
 not within the reputed-ownership clause in the Bankrupt Acts, 678.
- FOLLOWING** —  
 trust money, 162, 521 *et seq.*
- FOREIGN BANKRUPTCY** —  
 effect of, on proof of debts in England, 719.
- FOREIGN CONTRACTS** —  
 remedy on, barred by the statute of limitations, 259.
- FOREIGN DEBTOR** —  
 execution on judgment, in case of, 300, note (*f*).
- FOREIGN FIRM** —  
 service of writ on, 266, note (*o*).  
 income tax, when payable by, 394, note (*c*).  
 liability of, to bankruptcy law, 624, note (*n*).  
 See ALIEN.
- FOREIGN PRINCIPALS** —  
 agents for, contract as principals, 275, note (*s*).
- FORFEITURE** —  
 of interest in firm, 429, note.
- FORGERY** —  
 by one partner, liability of firm in case of, 155. And ADDENDA.
- FORM OF CONTRACT** —  
 effect of, on liability of partners, 176 *et seq.*
- FORMS** —  
 of judgments for account, 517, and note (*n*).  
 of order when sheriff seizes, 362. See Seton on Decrees, 1214, edition 4.
- FRAUDS, STATUTE OF** —  
 effect of, on contracts of partnership, 80.  
 as regards guarantees, 138.  
 excluded by part performance, 81, 83.  
 share in partnership not within, 348.
- FRAUD** —  
 liability for joint and several, 198, 702.  
 actions to rescind contracts on the ground of, 482 *et seq.*  
 where a third party intervenes, 480, 490.  
 where fraud did not induce the contract, 481.  
 how lost, 490.  
 actions for deceit, and other actions based on, 163, 479 *et seq.*  
 parties to actions relating to, 284, 461.  
 principal not bound by contract which is known to be a fraud, 148, 149.  
 concealment, when a, 480, and note (*m*).<sup>‡</sup>  
 bad bargains upheld, there being no fraud, 485.  
 re-opening accounts for, 513.  
 release set aside for, 145, 146.  
 bargains between outgoing and continuing partners set aside for, 486.  
 with the executors of a deceased partner set aside for, 487 *et seq.*  
 on faith of fraudulent accounts set aside, 486.

## FRAUD (continued) —

- effect of, on right to contribution, 369.
- on person holding himself out as partner, effect of, on his liability to creditors, 41.
- right of proof in respect of, 702.
- whether double proof allowed, 745, 749.
- by one partner on another, effect of, on right to prove in bankruptcy.
  - against joint estate, 724.
  - separate estates, 733-739.
- on creditors, by retiring from insolvent firm, 573.
  - by converting joint into separate property, 338, 698.
- appointment of receiver in cases of, 551.
- recovery of premiums in cases of, 64.
- statute of limitations in cases of, 259, 260.
  - concealed, 259, 511.
- of creditor, effect of, as regards his rights against retired partner, 249.
- of one partner, liability of firm for, 149, 160.
  - effect of, on actions by firm, 269.
- of firm, liability of firm in case of, 150 *et seq.*
- of agent, liability of principal for, 147.
- of infant, 75.
- liability of estate of deceased partner for, 596.
- estate of deceased partner not released by dealings with survivors where there has been, 252, 253.
- effect of, on agreements between partners changing joint into separate estate and *vice versa*, 338, 698.
- inducing person to join a firm, 167, 482.
- on incoming partners, 173.
- effect of, on doctrine of appropriation of payments, 235, 236.
  - discharge of the estate of a deceased partner, 250.
- partnership formed by, no defense to creditors, 103.
- ground of dissolution, 580.
- partnership articles construed so as to avoid, 406.

## FRAUDULENT ACCOUNTS —

- re-opening, 487.
- bargains on the faith of, set aside, 486.

## FRAUDULENT CONVEYANCES —

- are acts of bankruptcy, 627, 628.
- for present consideration, 629.
- may be set aside after lapse of three months, 621.

## FRAUDULENT PREFERENCE, 628, 630, 653.

- trustee in bankruptcy may disaffirm, 269, 653.
- by trustees, 630.

## FRAUDULENT STATEMENTS —

- of one partner, liability of firm for, 162 *et seq.*
- actions for, 481.
- as to solvency of another do not bind partner unless written, 138, 165.
- as to authority, 481, note (p).
- See FRAUD.

## FREIGHT —

- lien on, 355.

FRIENDLY SOCIETIES —

- not partnerships, 50, note (*j*).
- action against member of, for money belonging to, 568, note (*b*).
- criminal prosecution of members, 457, note (*a*).
- trustee of, may petition against member for debt, 634.

FURNITURE —

- of partners, to whom it belongs in the event of bankruptcy, 684, note (*r*).
- office, may belong to one partner only, 329.

FUTURE ADVANCES —

- securities for, effect of doctrines of merger on, 256.
- See CAPITAL.

FUTURE PARTNERSHIPS. 20 *et seq.*, 412.

- statute of frauds, effect of, on, 80.

GAIN —

- partnerships not having gain for their object, 2, 4, note (*t*), 50.

GARNISHMENT, 75.

- See ATTACHMENT.

GAZETTE —

- partner ordered to sign advertisement of dissolution for insertion in, 214.
- notice of dissolution in, effect of, 232.
- See ADVERTISEMENTS.

GENERAL —

- and particular partnerships, 50.
- powers restricted by object, 407.

GIFTS —

- one partner has no authority to make of firm goods, 133.

GOODS —

- actions between partners relating to, 560, 568.
- liability of partners for goods supplied before commencement of partnership, 204.
- pledge of, by one partner, when binding on firm, 140.
- purchases of, by one partner on credit of firm, 144.
- return of, by one partner, when binding on firm, 144.
- sale of, by one partner, when binding on firm, 146.
- “ by solvent partner, when binding on trustee of bankrupt partner, 568, 671.
- held for special purpose, not within reputed ownership clause, 683.

GOODS AND CHATTELS —

- what are, within the meaning of the rule as to reputed ownership, 678.

GOOD DEBTS —

- agreement as to bringing in, 417.

GOOD FAITH —

- required from partners, 303 *et seq.*
- agreement to observe, 418.
- See FRAUD; HONOR.

## GOOD-WILL —

- nature of, 439.
- is partnership property, 327, 443.
- sale of, for share in profits of business, 36, 37.
  - as a going concern, 558.
  - on dissolution, 438, n., 440, n.
  - by trustee of bankrupt partner, 652.
  - effect of on right of vendor to carry on the business sold, 444, 558.
  - carries right to use old firm name, 446.
- valuation of, 447.
- in case of death, 443.
  - retirement of one partner, 444.
- in connection with use of name, 444.
  - trade-mark, 114, 447.
- agreements as to paying for, 415, 447.
- property within meaning of Stamp Acts, 439, note (a).
- legatee of, 619.
- duty to preserve, 443, note (g).
- how far it survives, 342.

## GROSS PROFITS —

- and net profits, distinction between sharing, 7.

## GROSS RETURNS —

- distinction between sharing profits and gross returns, 8, 17.
- sharing does not constitute partnership, 8, 17.
- persons who share, not *quasi*-partners, 29.
- co-owners sharing, not partners, 18.

## GUARANTY —

- against debts given to incoming partner, 418.
- power of one partner to bind firm by, 138.
- ratification of, by firm, 138.
- as to solvency, when required to be written, 133, 165.
  - only binds parties who sign, 138.
- joint and several, 179, note (v).

## HIGHER NATURE —

- extinction of debts by taking securities of, 255, 703.

## HIGHWAYMEN —

- partnerships between, 93, note (n).

## HOLDING OUT —

- as partner, 40 *et seq.* See *QUASI-PARTNERSHIP*.
  - meaning of phrase, 42.
  - what constitutes, 42.
  - instances of, 44.
  - but not to plaintiff, 43.
  - sufficient proof of *quasi*-partnership, 83.
  - by not preventing use of name, 43.
  - by signing prospectus, 44.
  - where firm name does not disclose who partners are, 45, 46.
  - injunction to restrain, 544.
  - after retirement or dissolution, 217, note (h).
- by one partner as being solely concerned in a contract, effect of, 179, 277.
- effect of on proof in competition with separate creditors, 742, note (b).

**HOLDING OUT** (continued) —

- doctrine of, does not render the estate of deceased partner liable to third parties, 605.
- effect of, as regards doctrine of reputed ownership, 700.
- effect of doctrine of, as regards torts, 47.
- by infant, 74.
  - after coming of age, 73.
- by retiring partner, 45, 216.
- by continuing partners of bankrupt copartner, 212, 667.
- by surviving partner, 46.
- by promoters of company, 45.
- by married woman, 77.
- limit of doctrine of, 47.
- joint liability in case of, 197.

**HONOR** —

- high standard of, requisite among partners, 303.
  - those about to become partners, 303.
  - those who have ceased to be partners, 303.
- See FRAUD; GOOD FAITH.

**HOUSES** —

- built by one partner on partnership property, when joint estate, 330, 331.

**HUSBAND** —

- of partner, liability of, 78.
- and wife partners, liability of in bankruptcy, 78, 691, note (b), 730.
- See MARRIED WOMAN.

**IDIOCY** —

- dissolution on, 577. See LUNACY.

**IDIOTS** —

- partners who are, 76. See LUNATICS.

**IGNORANCE** —

- of one partner, effect of, on rights, 142. See NOTICE.
- of firm, effect of —
  - in case of misapplication of money by one partner, 151 *et seq.*
  - in other cases, 172.

**ILLEGAL ACTS** —

- injunction to restrain. . See INJUNCTION.
- contribution in respect of, 377.

**ILLEGAL PARTNERSHIPS** (Book I, cap. 5) —

- what partnerships are illegal, 91 *et seq.*
  - on general grounds, 92-94.
  - by particular statutes, 95 *et seq.*
  - attorneys and solicitors, 95, 100.
  - bankers, 95, 97.
  - brokers, 97.
  - insurers, 97.
  - medical practitioners, 98.
  - newspaper proprietors, 99.
  - patentees, 99.
  - pawnbrokers, 99.
  - theater managers, 101.
  - unincorporated companies with transferable shares, 101.
  - unregistered partnerships, 101.

# ILLEGAL PARTNERSHIPS (continued) —

- consequences of illegality, 102, 585.
  - as regards the right to recover back subscriptions, 106.
    - actions for account, 105.
    - actions by and against, 103 *et seq.*
    - contribution, 104, 377, 378.
- waiver of illegality, 104.
- illegality a defense, 105, 106.
  - when not a defense, 106.
  - set up by executors, 106.
  - never presumed, 91.
- concealed illegality, 106.
- members of, have no lien, 355.
- illegality of partnership business, a cause of dissolution of partnership, 585.
- appointment of receiver in case of, 552.
- members of, liable to indictment, 109.

# ILLEGAL TRUSTS, 108.

- actions for execution of, 108.

# ILLNESS —

- of partner, when a ground for dissolution, 578.

# IMPLIED POWERS (Book II, cap. 1, secs. 1 and 2) —

- of partners, 124-128.
  - as regards —
    - accounts, 128.
    - actions, 271, 272.
    - admissions, 128.
    - agents, 129.
    - arbitration, 129, 272.
    - banking account, 129.
    - bills and notes, 129 *et seq.*
    - bonds, 131, 136, 137.
    - borrowing money, 131, 321.
    - capital, increasing, 132, 321.
    - checks, 133.
      - post-dated, 133.
    - compromise, 136.
    - contracts, 134.
    - creditors' deeds, 135, 631.
    - debts, 134.
    - deeds, 136.
    - distress, 137.
    - extension of business, 137, 315 *et seq.*
    - Factors' Acts, 140.
    - guaranties, etc., 138.
    - insurances, 139.
    - interest, 139.
    - judicial proceedings, 139, 271, 272.
    - leases, 139.
    - mortgages, 139.
    - payment, 134.
    - pledges of chattels, 140.
    - notices, 141, 214, 571.
    - penalties, 143.
    - purchases, 144.
    - receipts, 145.
    - releases and covenants not to sue, 145.



**IMPLIED POWERS (continued) —**

of partners —

- as regards representations and admissions, 146.]
- sales, 146.
- taking security, 141.
- servants, 147.
- set-off, 136.
- ships, 147.
- tenders, 136.
- transfer of debts, 135.
- varying contracts, 134.
- winding up, 217, 218.

termination of —

- by notice, 219, 570.
- by death, 211.
- by bankruptcy, 212, 666.
- effect of holding out on. See **HOLDING OUT**.
- See **BANKRUPTCY**; **DISSOLUTION**.

**IMPLIED TERM —**

for duration of partnership, 122.

**IMPOSSIBILITY —**

of continuing partnership business, cause of dissolution, 575, 581.

**IMPUTATION OF PAYMENTS, 225 *et seq.***

See **APPROPRIATION OF PAYMENTS**.

**INCAPACITATED PARTNER, 11.**

**INCHOATE COMPANIES —**

subscribers to, not partners, 23.  
See **PROMOTERS**.

**INCHOATE PARTNERSHIPS, 20, 44, 202.**

**INCOME-TAX —**

on what profits payable, 394; note (c).  
payment of, by firm, where some of its members are abroad, 394,  
note (c).

**INCOMING PARTNER —**

actions by and against, 239 *et seq.*, 285 *et seq.*  
agreements for benefit of, 433.  
liability of, 205.  
under old articles, 435.  
for bills accepted for precontracted debt, 209.  
for acts done before they join firm, 208.  
how established, 208.  
frauds on, 173, 209, 479 *et seq.*  
effect of appropriation of payments on, 230.  
notice of previous transactions on, 143.

**INCORPORATION (see **CORPORATIONS**) —**

effect of, as regards sureties, 113.  
effect of unsuccessful attempt at, 5, 10.

**INCREASING CAPITAL —**

difference between, and borrowing, 132, 133, 321.  
See **CAPITAL**.

## INDEMNITY —

- against losses, 15, 63.
- agent's right to, 369 *et seq.*
  - when he obeys his instructions, 370.
  - when he disobeys his instructions, 370.
  - when he acts after his authority is revoked, 371.
  - when he acts without instructions, 371.
- right of partners to, 369 *et seq.*
- right of trustees to, 373.
- right to, where a person has been induced to become a partner by fraud, 484.
- extent of, 484.
  - before loss has been sustained, 374, and ADDENDA.
- right of outgoing partner to, from continuing partners, 451.
- usually given by continuing partners, 450.
- should be joint and several, 450.
- at law and in equity, former difference between, 374.
- action for, by one partner against another, 566.
- given by one partner, how far firm is bound by, 138.
- dissentient need not accept, 318.
- effect of taking joint covenant for, 199.
- persons entitled to may prove in bankruptcy, when, 708, note (y).
- effect of, on lien, 451.
- of executors of deceased partners when acting under the order of the court, 594.
  - when trading with assets of testator under directions in the will, 606.

See, also, CONTRIBUTION.

## INDIA —

- allowances to partners in, 381.

## INDIAN CONTRACT ACT —

- definition of partnership in, 3.
- division of partnerships in into ordinary and extraordinary, 4.

## INDICTMENT —

- by one partner against another, 457, note (a).
- by surviving partners and the executors of a deceased partner, 288, note (z).
- for illegal partnership, 109.

## INDORSEMENT. See PROMISSORY NOTES.

## INFANT —

- partners, 74.
  - liability of for holding himself out as partner, 74, 76.
    - after coming of age, 76.
  - to be made bankrupt, 75, 624, note (n).
    - sued with other partners, 280, 281.
  - for acts of others, 74, 75.
  - for fraud, 75.
  - should not be joined in action against the firm, 74, note (c).
- avoidance of contracts by, 75.
- ratification of contract by, 76.
- sale of share of, in partnership, 557.
- Infants' Relief Act, 1874, 76.

## INFORMATION (see ACTION) —

- duty of partners to give, 303.
- effect of withholding, 304, note (f).

## INJUNCTION —

- generally, 538 *et seq.*
- necessity of, 538.
- granted where a receiver would be refused, 539.
- between co-owners, 59, 62.
- against partners where no dissolution is sought, 539.
  - where partnership is at will, 540.
  - in actions for dissolution, 541.
- against persons claiming under a late partner, 542.
- to restrain —
  - actions, 543.
    - for balance of settled account because others are unsettled, 543.
    - ejectment, 541.
  - executions against firm for separate debt of one partner, 359.
  - advertising dissolution, 539.
  - alteration in principle on which profits dealt with, 319.
  - change in character of business, 316.
  - majority, 317.
  - holding out, 544.
  - opening letters, 539; 542, note (e).
  - using names, 114, 539.
    - by continuing partners, 114, 217, note (h), 605.
    - by successors in business, 445.
  - misapplying moneys of firm, 540.
  - obstructing plaintiff in the exercise of his rights, 540.
  - carrying on a particular branch of the business, 540.
  - driving plaintiff to a dissolution by misconduct, 540.
  - publishing news in a rival paper, 540, 541.
  - writing plays for rival theater, 541.
  - getting in partnership assets, 542.
  - negotiating bills, etc., 542.
  - misconduct, 543.
  - withholding partnership books, 542, 544, note (t).
  - breaches of express agreements, 542, 543.
  - carrying on business, 543.
    - save for winding up, 541.
    - after a dissolution, 541.
    - after sale of business, 542.
    - by surviving partners in old name, 217, note (h), 445, 605.
  - interfering with proper winding up of partnership, 588.
  - against dissolution of partnership, when granted, 571.
  - divulging trade secrets, 543.
  - publishing accounts, 542, note (e).
  - making slanderous statements, 542, note (e), 544, note (x).
  - excluding copartner, 395, 540, 543.
    - though lately insane, 539.
  - proceedings in bankruptcy, 636, note (x).
  - managing partners, 466, 544.
  - illegal acts, 539.
  - renewal of lease, 307, note (s).
- parties to actions for, 461.
  - must come with clean hands, 544.

## INQUIRIES —

- directed in judgment for administration of estate of deceased partner, 600.
- additional, when added, 69, 607.

## INSANITY —

a ground for dissolution, 577 *et seq.* See LUNACY and LUNATIC.

## INSOLVENCY —

of partner, power to dissolve in case of, 425, 576.

test of, 425.

of firm, meaning of, 425, note (k).

See BANKRUPTCY.

## INSOLVENCY (see BOOKS; DISCOVERY) —

of accounts, etc., of firm, 404.

agreement precluding, 504.

by agent, 504.

by accountants, etc., 504.

of books in use, 505.

in actions for account, 504.

## INSPECTORS —

appointment of, in bankruptcy, 645.

## INSPECTORSHIP DEED, 754.

trustees of, not partners, 21.

## INSTRUCTIONS —

agent disobeying, effect of on indemnity, 370.

## INSURANCE —

power of one partner to bind firm by, 139, 178.

marine, 97. See MARINE INSURANCE.

## INSURANCE COMPANIES —

maritime, formerly illegal, 97.

## INTENTION —

a test of partnership, 10, 11.

## INTEREST —

admission by one partner that interest is payable, 139.

in accounts between partners, 389.

on capital, 389.

where capital payable out by instalments, 390, note (o).

on undrawn profits, 390.

on advances, 390.

on overdrawings, 390.

where accounts confused, 392.

charged against partner who will not produce books, 538.

on arrears of a share of profits, 390, note (p), 395.

where firm claims what has been obtained by one partner, 391.

agreements as to payment of, 418.

on money wrongfully employed in partnership business, 521 *et seq.*

when compound interest allowed, 390, note (s), 531.

charging executors with, for not converting testator's share into money, 615.

separate creditors entitled to, up to date of receiving order, against joint creditors, 730, and note (n).

joint creditors entitled to, up to date of receiving order, as against separate creditors, 720.

on debts in bankruptcy, 719, 720, 730, note (n).

paid by continuing partners after dissolution does not discharge retired partner, 243, 246, 250, 251.

as to appropriation of securities to, 720, note (n).

INTERNAL REGULATION —

interference of court with respect to matters of, 464 *et seq.*  
See MAJORITY.

INTERPLEADER —

sheriff's right to, 358, note (g), 362.  
order that sheriff withdraw, is a stay, 625, note (u).

INTERPRETATION —

of partnership articles, 406 *et seq.*  
See ARTICLES OF PARTNERSHIP.

INTERROGATORIES —

oppressive, 502.  
as to acts of agents, 502.  
duty to make inquiries as to subject-matter of, 502.  
See DISCOVERY.

INTRODUCTION —

of new partner, provision as to, 433.

INVOICE—

evidencing partnership, 89.

I O U —

action by one party against another on, 565.

ISSUE —

to try partnership, 83, note (n).

JOINDER OF PARTIES. See ABATEMENT; ACTIONS; PARTIES.

JOINT ADJUDICATIONS —

of bankruptcy, 637. See BANKRUPTCY.  
rules as to, 632.

JOINT BOND —

held joint and several, when, 194 *et seq.*, 437, note (o), and ADDENDA.  
held separate only, when, 137.

JOINT COVENANTS —

when not held joint and several, 193.  
when held joint and several, 437, note (o). And see ADDENDA.

JOINT CREDITORS —

who are, 701 *et seq.*  
proof by, in bankruptcy against the joint estate, 692, 720.  
separate estates, 729.  
against both estates, 747.  
when secured, 709, 714, 749.  
when treated as joint and several, 194 *et seq.*  
in bankruptcy, 743.  
paying off separate creditors, 733.  
rights of, against estate of deceased partner, 598.  
position of executors of deceased partners as regards, 594.  
See BANKRUPTCY; DECEASED PARTNER; JOINT DEBTS.

JOINT DAMAGE —

when necessary to support joint action, 278.

## JOINT DEBTS (see BANKRUPTCY) —

- what are, 702.
- when treated as joint and several, 194 *et seq.*, 743.
- bills, 180, 702.
- frauds, 199, 702.
- breaches of trust, 702.
- money of which firm has had benefit, 189, 703, 721.
- conversion into separate, 703.
- cannot be set off against separate, 291 *et seq.*, 660.
  - unless there is an agreement to that effect, 661.
- effect of order of discharge of one bankrupt debtor on, 752.
- will support separate adjudication, 637.
- composition for, does not release separate liability, when, 238.
- how paid, 598.

See JOINT CREDITORS.

## JOINT DIVIDENDS —

- declaration of in bankruptcy, 693.

## JOINT ESTATE —

- what is, 323. See PROPERTY.
  - in cases of holding out, 197, 700.
  - conversion of, into separate, 334, 698.
  - effect of doctrine of reputed ownership on, 684, 732.
  - importance of distinguishing from separate, 322.
  - distinct account of, to be kept in bankruptcy, 693.
  - consolidation of, with separate estates, 695.
  - proof against, 720.
    - by joint and separate creditors, 701.
  - proof against, by married woman, lending money to husband partner, 730.
  - is distributed without reference to the partners' interests in it, 701.
  - distribution of surplus of, 728, 742.
  - absence of, confers a right of proof against separate estates, 731.
  - rules as to, in bankruptcy, 692, 693, 697.
  - mortgage of for separate debt, when an act of bankruptcy, 631.
  - may be treated as separate, when, 684.
  - assets brought in in breach of trust not part of, 724.
  - costs of trustee, when paid out of, 694.
  - remuneration of trustee when paid out of, 694.
- See, also, BANKRUPTCY.

## JOINT OBLIGATION —

- performance of, 224.
  - extinction of, 224.
    - by merger in security of higher nature, 255, 703. And see the ADDENDA.
    - effect of release on, 237.
    - effect of covenant not to sue on, 237.
- See JOINT AND SEVERAL.

## JOINT OWNERS —

- not partners, 51, 55, 60.
- remedies between, 53.

## JOINT PURCHASES —

- of goods for sale, 53.
- of goods not for sale, 53.

- JOINT AND SEPARATE CREDITOR** (see **JOINT CREDITORS**) —  
 holding security, 749.  
 proof in bankruptcy by, 701.
- JOINT AND SEVERAL** —  
 when partnership debts are, 192, 193, 280, 702.  
 rule applies between creditors, 195.  
 contracts, who to be sued on, 280, 288.  
   persons liable on, may be sued jointly, severally, or in the  
     alternative, 265, 282.  
   executors of deceased partners may be joined, 288.  
 debts, merger of in higher securities, 255, 702.  
 liability —  
   on contracts, 183.  
   for torts and frauds, 198, 702.  
   for breaches of trust, 199, 200, 702.  
   on promissory notes, 187.  
   on bills, 180, 702.  
   power of one partner to bind firm by, 130.  
 receipt of composition on joint debt, effect of on separate liability,  
 238.
- JOINT STOCK** —  
 not essential to partnership, 12, 13.
- JOINT-STOCK ASSOCIATION** —  
 unincorporated, 6, 90, 102, 365, and last chapter.
- JOINT TENANCY** —  
 or tenancy in common, what creates, 51, note (*n*).
- JOINT TENANTS** (see **JOINT OWNERS**) —  
 partners in profits only, 53.  
 remedies between, 57-62.
- JUDGMENT** —  
 when the court can go behind, 703, note (*b*).  
 extinguishes debt for which it is obtained, 255, 703, 704. And  
   ADDENDA.  
   not if it is a colonial judgment, 255, note (*s*).  
 form of, against firm, 192, note.  
 against some partners, effect of as regards the others, 193, 255,  
   256.  
   as regards a dormant partner,  
   255, note (*s*).  
 against firm when judgment against a member, 625, note (*u*).  
   power of one partner to consent to, 272.  
 against surviving partners, effect of as regards estate of deceased  
   partner, 195, 250, 603.  
 against estate of deceased partner, effect of as regards surviving  
   partners, 195, 603.  
 effect of on proof in bankruptcy, 703.  
 dissolution dates from when, 572.  
   where lunacy, 579.  
   where misconduct, 582.  
 form of, for partnership account, 516, 517, note (*n*).  
 form of, in action by joint creditors against executor of deceased  
   partner, 600.  
 on sale of partner's share by sheriff. Seton on Decrees, 1214, n.,  
   ed. 4.  
 additional inquiries when added to, 69, 601.

**JUDGMENT (continued) —**

- may be entered up against partners in name of firm, 266, 298.
  - how execution issues where, 299, 300.
- action founded on, 300.
- debtor summons on, when, 300.
- execution of. See **EXECUTION**.
- as to mode of entering up, 266.
  - See **LEGAL PROCEEDINGS**.

**JUDICIAL PROCEEDINGS —**

- power of one partner to act for firm in, 139, 271.
  - See **ACTION**; **BANKRUPTCY**.

**JUDICATURE ACTS —**

- effect of, as regards parties to actions, 264 *et seq.*, 458.
  - appointment of receivers, 546.
  - administrations. **ADDENDA**.

**JURISDICTION —**

- of court in bankruptcy, 645, and note (y).

**JURY —**

- to try partnership, 83.

**JUST ALLOWANCES, 519.****KENT —**

- his definition of partnership, 3.

**KNOWLEDGE —**

- effect of, where breach of trust, 161.
- as regards actions for misrepresentation and fraud, 163, 481.
  - See, also, **NOTICE**.

**LACHES —**

- of plaintiff, when a bar to relief, 466.
- barring right to account, 467.
- in setting aside agreements, 467.
- in cases of mining partnerships, 468.
- when not a bar, 471 *et seq.*
- demurrer on ground of, 475.
- effect of recognition of title on, 474.
- of one partner in asserting his rights, effect of, 304.

**LAND —**

- proof of a partnership in, 81.
- belonging to firm, treated as personal estate, 343 *et seq.*
- when partnership property, 331-333.
- when not, 334, 343.
- vests in trustee in bankruptcy, 651.

**LAPSE OF TIME. See DELAY; LIMITATIONS, STATUTE OF; TIME.****LARCENY —**

- of property of firm by partner, 456, 457, note (a).

**LAW —**

- mistakes of, when corrected in accounts, 514.

**LAW AND EQUITY (see EQUITY) —**

- difference between —
  - as regards contribution and indemnity, 374. See **CONTRIBUTION**.
  - as regards joint and several liabilities, 193.



## LEASE —

- specific performance of agreement for, after term is expired, 476.
- injunction against grant of renewed, to one partner, 496, note (o).
- power of one partner to take a lease for a firm, 139, 315.
  - to distrain, 137.
- liability of retired partners on covenants in, 240, note (a).
- of partnership property, effect of, on duration of partnership, 121.
- of business premises when partnership property, 326, 328.
- of mines, 328, note (t).
- of salt works, 329, note (a).
- renewal of by one partner inures to benefit of firm, 307.
- notice to quit by partners, 279, 562.
- forfeiture of, by assignment by one partner to another without license, 336, note (z).
- right of partner to reject renewal of, 308, 309.
- right to retain benefit of renewed, on dissolution, 571, note (g).
- not within doctrine of reputed ownership, 678.

## LEGACY —

- of share in partnership.
  - rights of legatee, 619. See LEGATEE.
  - ademption of, 620.
  - what passes under, 340, 619.
  - duty of executors to realize, 615, 620.
  - income of as between tenant for life and remainder-man, 620.
  - right of specific legatee to profits, 620, 621.
    - if declared after death, 621.
    - not to other profits, 621.
    - as to dividends and bonuses, 621.
- of good-will, 439, note (b), 619.
- to partner indebted to testator, 620.
- to a firm, 113.

## LEGACY DUTY —

- payable on partner's share of assets, 347, and note (a).

## LEGALITY. See ILLEGALITY.

## LEGAL PROCEEDINGS —

- firm, how described in, 115, 116, 265, 274.
- by and against firm, 115, 116, 264 *et seq.*
- power of one partner to act for firm in, 271, 272.
- See ACTIONS; BANKRUPTCY; JUDGMENTS.

## LEGATEE —

- of a deceased partner.
  - what passes to, 340, 619, 620.
  - rights of, against his executors, 612, 616, 619.
    - the surviving partners, 610.
  - to an account, 494.
    - when there is collusion, 494.
- where the assets of the deceased are not got in, 614 *et seq.*
- where the surviving partners are the executors of the deceased, 528, 614.
- of good-will, 439, note (b), 619.
- where tenant for life and remainder-man, 629.
- See LEGACY.

## LENDER —

- distinction between and partner, 16, 37. And see the ADDENDA.

## LETTERS —

injunction to restrain opening, 539, 542, note (e).  
evidence of partnership, 89.

## LIABILITY —

of partners —

*inter se*. See ACCOUNT; ACTION; CONTRIBUTION.  
for the acts of each other, 128 *et seq.* See IMPLIED POWERS.  
of individual partners on contract in excess of their powers, 192.  
when acting and dealt with on their own  
account, 179.

by holding out, 40 *et seq.* See HOLDING OUT.

by sharing profits, 25-46. See PROFITS.

statute as to, 35.

in respect of —

dealings of copartner before execution of partnership articles,  
202.

before joining the firm, 202.

unauthorized transactions, 126, 167.

with notice, 167.

torts and frauds, 147 *et seq.*, 702.

breaches of trust, 160-162, 199, 200.

misapplication of money, 150-162.

misrepresentations, 162, 479.

bills of exchange in various forms, 180 *et seq.*, 702, 709 *et seq.*

See BILLS OF EXCHANGE.

promissory notes, 187.

See PROMISSORY NOTES.

contracts under seal, 177.

not under seal, 177.

not binding on them, but of which they have had  
the benefit, 189 *et seq.*

in which all the partners are not named, 213, 275.

when joint and when several —

as regards contracts, 192.

torts, 198, 702.

breaches of trust, 161, 199, 200.

in cases of holding out, 197.

commencement of, 201 *et seq.*

extent of, 200.

limited. See LIMITED LIABILITY; LIMITED PARTNERSHIP.

termination of, 210, 223.

as to future acts, 210.

by notice of dissolution, 214. See DISSOLUTION.

by dissolution without notice, 213.

effect of notice, 210 *et seq.*

what amounts to notice, 221 *et seq.*, 428, 571, 679.

by death, 211.

by bankruptcy, 212.

effect of lunacy as regards, 213.

holding out, 216.

as to past acts, 223.

by payment, 225.

See APPROPRIATION OF PAYMENTS.

by release, 237.

by dealings with continuing partners, 243 *et seq.*

by the merger of securities, 254, 703.

by lapse of time, 257. See LIMITATIONS, STATUTE OF.

by death, 223, 594 *et seq.* And see DEATH.

**LIABILITY (continued)—**

termination of —

as to past acts —

by bankruptcy, 223. And see **BANKRUPTCY**.

by judgment against copartner, 193, 255, 793. And **ADDENDA**.

attempts to limit, 201.

effect of notice of agreement limiting, 176, 201.

creditors not affected by agreements between the partners, 239 *et seq.*

unless they have notice, 176. And see **NOTICE**.

of dormant partner, 125, 178. See **DORMANT PARTNER**.

of incoming partner, 205. See **INCOMING PARTNER**.

of nominal partner. See **HOLDING OUT**; **NOMINAL PARTNER**; **QUASI-PARTNERSHIP**.

of retired partner —

dormant, 212, 214, 229.

not dormant, 213.

of estate of deceased partner, 594 *et seq.* See **DECEASED PARTNER**; **EXECUTORS**.

of executors of deceased partner, 604. See **EXECUTORS**.

for breach of trust in employing assets in the business of a partnership, 604 *et seq.*

of promoters. See **PROMOTERS**.

of agent who exceeds his authority, 192, 370. And see **AGENT**.

of principal for torts and frauds of his agent, 147.

of ship-owners in respect of each other's acts, 147, note (y).

meaning of, in bankruptcy, 708.

proof in respect of what, in bankruptcy, 708.

**LIBEL —**

actions by partners for, 278.

**LICENSES —**

form of, when no evidence of partnership, 35.

not taking out. See **EXCISE LAWS**.

**LIEN —**

of partners —

nature of, 351 *et seq.*

consequences of, 352.

to what property it attaches, 352.

exists only on partnership assets, 353.

exists as against all persons claiming a share in the assets, 353, 354.

prevails as against assignee or mortgagee, 353.

no lien on a partner's share for ordinary debts due from him to firm, 354.

loss of, 355.

no lien if partnership is illegal, 355.

available against trustee of bankrupt partners, 647.

of partner, must be satisfied before a partner proves against his copartner, 741.

proof for what is not satisfied by, 741.

of a firm, effect on, where a change occurs in the firm, 120.

effect of express indemnity on, 451.

on funds appropriated for payment of particular bills, 656, note (x).

effect of doctrine of reputed ownership on, 679, 684.

**LIEN (continued) —**

- creditors of a firm have no lien on its property, 334, 354, 698.
- on partnership assets in cases of rescission of contract for fraud, 484.
- of co-owners, 60, 355.

**LIMITATIONS, STATUTE OF —**

- between partners, 508; non-partners, 257.
- when not a defense, 470, note (c).
- estate of deceased partner, when discharged by, 597.
- when a bar to an action for account between partners, etc., 508.
- time within which actions must be brought, 257, 258.
- summary of rules relating to, 259.
- provisions of Mercantile Law Amendment Act as to, 262, 509.
- merchants' accounts, 509.
- current accounts, 509.
- acknowledgment, 260, and note (a), 511.
- payment by receiver in an action, 511.
- cases of fraud, 260, 511.
  - trust, 260, 511.
- act of one partner, effect of, 261, and note (g).

**LIMITED LIABILITY —**

- in partnership, does not exist, 200.
- attempts to introduce, 201.
  - by stipulating that funds only shall be liable, 201.
  - by notice of terms of partnership, 176.
- under Bovill's Act, 35 *et seq.*, 201.

**LIMITED PARTNERSHIP, 201, note.****LIQUIDATED DAMAGES —**

- agreements for payment of, 454.

**LIQUIDATOR —**

- notice to, notice to company, 680, note (x).

**LIS PENDENS —**

- plea of, 256, note (y).

**LOANS —**

- to a firm by trustees after the partners are changed, 113.
- to one partner, of which firm has had the benefit, 189 *et seq.*
  - firm is bound, when, 131, 132, 191.
- by partner to firm, 384.
- contracts of loan compared with contracts of partnership, 15, 16, 37 *et seq.*, and ADDENDA.
- at interest varying with profits, 30, 35.
- for share of profits, if fraudulent may constitute a partnership, 37.
  - or if lender is not merely a creditor, 37.
- by executors of deceased partner to firm, gives the estate no right to profits, 615.
- distinguished from capital, 320.
- action to recover, between partners, 564.
- And see ADVANCES.

**LOOKING ON —**

- effect of, as a bar to relief, 466 *et seq.* See LACHES.

**LOSS OF CAPITAL —**

- effect of, 321, 403.
- when a cause of dissolution, 576.
- how shared, 350, 403.

LOSSES —

- stipulation against, 15.
- effect of notice of, by creditors, 201, 385.
- indemnity against, 63.
- as to payment of, 25-48, 385.
- attributable to one partner, 386, 387.
- adopted by firm, 388.
- how to be borne, 349, 385, 402, 403.
- as between tenant for life and remainder-man, 621.
- See CONTRIBUTION; PARTNERSHIP; PROFITS.

LUNACY —

- of partner, effect of as regards liability of himself and copartners, 213.
- a ground for dissolution, 577.
- date of dissolution in case of, 579.
- costs of payable out of partnership assets, 579.
- sale of share in partnership in case of, 553, 556.
- receiver and manager in case of, 553.
- does not prevent a dissolution by notice, 425, 426, 579.
- evidence of, 578.
- partner recovering from, entitled to take part in business of the firm, 539.
- apportionment of premium, whether ground for, 57.

LUNACY REGULATION ACT, 579.

LUNATIC —

- may be a partner, 76.
- service of notice of dissolution on, 424, 579.
- service of writ on, 266, note (o).
- partner becoming, a cause for dissolution, 577.
- entitled to sue for dissolution, 579.
- when entitled to share of profits made since dissolution, 527.
- effect of Bankruptcy Act, 1883, on, 624, note (n).

MAJORITY —

- powers of, 313 *et seq.*
- in matters of ordinary business, 314.
- instances of what it cannot lawfully do, 314.
- cannot alter principle on which profits are to be divided, 319.
- change nature of business, 315.
- sell shares of minority, 407.
- agreements as to, 313, 419.
- to bind minority, 318.
- duty of, to hear minority, 315.
- after a dissolution, 218.
- account settled by, binding on minority, 512, note (d).
- See INJUNCTION.

MALA PROHIBITA —

- and *mala in se*, 94.

MALICIOUS INJURY —

- liability of firm for, 149.

MANAGEMENT —

- interference by court in matters of internal, 466 *et seq.*
- of affairs of partnership, right to take part in, 301.
- if no agreement to the contrary, 10, 301.
- expenses of, how paid, 380 *et seq.*, 418.
- See, also, INJUNCTION; MAJORITY.

**MANAGER —**

- and receiver, appointment of, 545. See RECEIVER.
- at instance of co-owner, 59, 62, 548.
- difference between receiver and, 545, 547.
- sharing profits, when a partner, 10, 13.
- partner appointed when, 553.

**MANAGING COMMITTEE —**

- liability of members of, for each other's acts, 45.
- See PROMOTERS.

**MANAGING PARTNER —**

- interference with, by the court, 466, 544.
- right of to salary or commission, 380, and note (n).
- authority of, 124.

**MANIFEST ERRORS —**

- clause as to, 420, 421.
- See ACCOUNTS; MISTAKE.

**MARINE INSURANCE —**

- partnerships for, formerly illegal, 97, 98.
- agreements for, must be in writing, 80, 98, note (i).
- may be stamped after execution, 98, note (i).

**MARRIAGE —**

- of female partner, dissolution of partnership by, 583.

**MARRIED WOMAN —**

- capacity of, to be a partner, 77.
  - where no separate estate, 78.
  - where she has separate estate, 79.
- liable to bankruptcy law, when, 78, 624, note (n). And ADDENDA.
- Married Woman's Property Act, 78.
- rights of, in partnership with her husband upon his bankruptcy, 78, 691, note (b).
- See, also, HUSBAND.
- loan by, to husband, for purposes of trade, 78.
- proof for, as joint creditor, 701, note (l), 730.
- liability when taking place of deceased husband, 208, note.

**MARSHALING —**

- assets of bankrupt partners, 717, 718.
- equitable doctrine of, applies in bankruptcy, 661, note (z).

**MAXIMS —**

- Accessorium sequitur suum principale*, 522.
- Actio personalis moritur cum persona*, 595.
- Culpa est immiscere se, rei ad se non pertinenti*, 372.
- Ex turpi causa non oritur actio*, 103, 108.
- Expressio unius est exclusio alterius*, 406, note (b).
- Expressum facit cessare tacitum*, 406.
- In pari delicto melior est positio defendentis*, 370.
- In re communi potior est conditio prohibentis*, 314.
- In societatis contractibus, fides exuberet*, 303.
- Jus accrescendi inter mercatores locum non habet*, 340, 591.
- Nemo debet bis vexari pro eadem causa*, 256.
- Nemo potest mutare concilium suum in alterius injuriam*, 371.
- Modus et conventio vincunt legem*, 408.
- Protestatio facto contrario non valet*, 41.
- Res inter alios acta*, 239, 512, note (d).
- Respondeat superior*, 148.

**MAXIMS (continued) —**

- Semper enim non id quod privatim interest unius ex sociis servari solet, sed quod societati expedit, 305.*
- Si quid societati debetur singulis debetur et quod debet societas singuli debent, 5.*
- Si quid universitati debetur singulis non debetur, nec quod debet universitas singuli debent, 5.*
- Socius mei socii, socius meus non est, 48.*
- Vigilantibus non dormientibus subveniunt leges, 467.*

**MEDICAL PRACTITIONERS —**

- partnership between, unqualified, 98.

**MEETINGS —**

- attending, evidence of partnership, 90.

**MEMBERS —**

- of partnerships. See **FIRM**; **PARTNERS**.

**MEMORANDA —**

- evidence of partnership, 89.
- when unsigned, 81, note (c).

**MERCANTILE LAW AMENDMENT ACT —**

- as to sureties, 119.
- as regards statutes of limitation, 262, 263, 509.

**MERCHANTS —**

- custom of as to payment of interest, 389.

**MERCHANTS' ACCOUNTS —**

- provisions of statutes of limitation as to, 259, 509.
- See, also, **ACCOUNTS**.

**MERGER —**

- of debts and securities, 254, 703.
  - by judgment recovered, 255, 703. And **ADDENDA**.
  - by taking security of a higher nature, 225. And **ADDENDA**.
  - unless security only collateral, 255.
  - by taking bills, 254, 702.
- of securities in bankruptcy, 703.
- of joint and several obligations, 256.
- effect of on securities for further advances, 256.
- as to joint bonds given for joint and several debts, 256.
- effect of on creditor petitioning for an adjudication of bankruptcy, 257.
- not an extinction of the debt, 257.

**MINES —**

- verbal agreements as to, 82.
- devises of, how far partners, 333.
- co-owners of, 54.
  - when partners, 55, 328, note (f).
- partner in coal mines may not be an inspector of, 117.
- appointment of receiver and manager of, 55, 552.
  - as against mortgagee, 553.
- account of profits of, 498.
  - by assignee or mortgagee of share, 493.
  - without dissolution, 498.
- laches a bar to relief concerning, 468.
- transfer of shares in, 56, 366.

## MINES (continued) —

- shares in, within Mortmain Acts, 348.
- not within statute of frauds, 348.
- sale of, on dissolution, 555, 557.
- See COST-BOOK MINING COMPANY.

## MINE OWNERS —

- power of to draw bills in name of firm, 130.

## MINING COMPANY —

- directors of, advancing money to work mine, 382.
- whether dissolved by bankruptcy of one member, 649.

## MINING PARTNERSHIPS, 406, note, 557, 763, note.

## MINORS. See INFANT.

## MINORITY —

- always entitled to be heard, 315.
- when bound by majority, 313.
- when not, 313.
- bound by account stated by majority, 512, note (d).
- See, also, MAJORITY.

## MISAPPLICATION OF MONEY —

- injunction to restrain, 540, 541. See INJUNCTION.
- by one partner, liability of firm for, 150 *et seq.*
- See BREACH OF TRUST.

## MISCONDUCT —

- losses incurred by, how borne, 386, 387.
- loss of right to contribution by, 370, 386, 387.
- a bar to injunction at the instance of the guilty party, 544.
- of partner, a ground for dissolution, 580.
- not at his instance, 582.
- time from which dissolution dates, 582.
- degree of, 581.
- with a view to compel copartners to dissolve, 497, 575, 582.
- injunction in cases of, 543.
- receiver in cases of, 550.
- apportionment of premium in cases of, 68.
- See, also, INJUNCTION; RECEIVER.

## MISJOINDER OF PARTIES. See ACTION; PARTIES.

## MISNOMER. See MISTAKE; NAME.

## MISREPRESENTATIONS —

- actions for, 163, 479 *et seq.*, 481.
- what will support, 163, 480, 481.
- must be material, 481.
- have been relied on, 481.
- known to party making it, 481.
- liability of partners for, 162 *et seq.*
- rescission of contract for, 479, 482.
- as to nature of business, 166.
- of authority, 481, note (p).
- See, also, FRAUD; LIABILITY; RESCISSION OF CONTRACT.



**MISTAKE —**

- re-opening accounts for, 513.
- in proof in bankruptcy, corrected, 694.
- in name of firm, consequences of as regards bills of exchange, etc., 185.
- in other respects, 115.

**MONEY —**

- had and received, action for, by one co-owner, against another, 59, note (e).
- agreements as to drawing, 418.
- lent, action by one partner against another for, 565, 567. See ACTION.
- power to borrow, 131.
- effect of having had the benefit of, 189 *et seq.*, 703.
- misapplication of —
  - by one partner, liability of firm for, 150 *et seq.*
  - injunction to restrain, 542. See INJUNCTION.
- trust, following, 162.
  - employment of, in partnership business, 162, 523, 606. See BREACH OF TRUST; LIABILITY.

**MONSTER —**

- partnership for exhibiting, 92.

**MORTGAGE —**

- equitable, may be created or extended by parol, 119, 715.
- by one partner on behalf of firm, 139, 140.
- effect of change of firm on, 119.
- judgment on covenant in, effect of as regards right to foreclose, 255, note (p).
- bona fide*, not an act of bankruptcy, 629.
- of joint estate to separate creditors, when an act of bankruptcy, 632.
- of separate estate to joint creditors, 632.
- collateral, to secure share of profits, 36, note (t).
- effect of, as regards merger, 255. See MERGER.

**MORTGAGEE —**

- of partner, right of to account, 493.
  - position of, in the event of bankruptcy, 709 *et seq.*
  - partner's lien prevails against, 364.
- of mine, appointment of receiver against partner who is, 553.
- equitable, parties to action by, 461.

**MORTMAIN ACTS —**

- share of partner in partnership real estate within, 348.

**MULTIFARIOUS —**

- one action for the administration of the estates of several partners, not necessarily, 603, 604.

**MUTUAL CREDIT, 290, 654 *et seq.***

- See BANKRUPTCY; SET-OFF.

**MUTUAL INSURANCE COMPANIES —**

- when not partnerships, 51.
- policies must be in writing, 80, note (a), 97, 98.
- may be stamped after execution, 98, note (2).

**NAME—**

- on doors, bills, etc., evidence of partnership, 89.
- carrying on business under a name not one's own, not illegal, 92.
- New York and other statutes construed, 92, 114.
- effect of not preventing use of, 217.
- of firm, 112.
  - not disclosing partners, effect of on doctrine of holding out, 45, 46.
  - may be used in actions, 111, 265, 458. See **ACTIONS**.
  - right of majority to authorize manager to sign, 314, 315.
  - judgment may be entered up in, 266, 299.
    - how execution issues, where, 300.
  - a trade-mark, 114, 447.
  - part of good-will, 444. See **GOOD-WILL**.
  - can be assigned with good-will, 114, 447.
  - registration of, 114, 447.
  - right to use after sale of business, 440.
  - right to use after dissolution, 444.
  - continued use of, when wrong, 446.
  - agreements as to, 413.
  - contracts in, who should sue on, 279 *et seq.*
  - several firms with same, 181.
  - bills of exchange in.
    - liability of firm on, 180 *et seq.*
    - effect of mistake in, 185.
      - when unimportant, 186.
      - of changing, 185.
      - effect of use of wrong name, 185.
      - liability of person using wrong name, 185.
  - same as that of individual, consequence of, 182, 446.
  - of corporation, 112.
  - partner has no authority to bind the firm by a name not its own, 184.
  - injunction to restrain use of, granted, when, 114, 217, note (*h*), 446, 539, 542.

**NAMES—**

- Copyright Acts do not apply to, 114, note (*g*).

**NAVIGATION LAWS—**

- breach of, when no defense to action for account, 107.

**NECESSITY—**

- extraordinary, power of partner in case of, 126.
- tested by nature of partnership business, 127.

**NEGLIGENCE—**

- loss of right to contribution by, 378, 387.
- of servants, liability for, 148.
- of partners, liability for, 149.

**NEGOTIABLE INSTRUMENTS. See **BILLS OF EXCHANGE; PROMISSORY NOTES.******NEGOTIORUM GESTOR, 372, note (*x*).****NET PROFITS—**

- and gross profits, distinction between, 7.
- See **PROFITS**.

## NEW PARTNER—

- agreements as to introduction of, 433.
- effect of introduction of on retired partner's liability, 245 *et seq.*, 248.
- on creditor's rights, 239 *et seq.*

See INCOMING PARTNER.

## NEW SECURITY—

- effect of taking, 244, 246, 253. See MERGER.

## NEWSPAPERS (see ADVERTISEMENT)—

- assignment of share by co-owner of, 364, note (u).
- sale of, account in, 497.
- injunction against publishing news in, 540, 541.
- effect of advertisements of dissolution in, 222, 223.

## NEWSPAPER PROPRIETORS—

- penalties upon, in default of registration, 99.

## NEW YORK—

- civil code of, definition of partnership in, 2.

## NEXT OF KIN. See DEATH; DECEASED PARTNER; EXECUTORS; LEGATEE.

## NOMINAL PARTNER—

- not liable to creditors to whom he has not held himself out, 43.
- when to sue with others, 276.
- may be made bankrupt, 633.
- may be included in joint adjudication, 637.
- See, also, HOLDING OUT; OSTENSIBLE PARTNER; QUASI-PARTNERSHIP.

## NOMINATION—

- of successor in firm, right of, 433, 434, 435.
- See OPTION.

## NON-JOINDER—

- of parties. See ACTION; PARTIES.

## NON-SURVIVORSHIP—

- effect of doctrine of, between partners, 340 *et seq.*

## NON-TRADER—

- and trader, distinction between in bankruptcy, 624.
- implied power of, to draw bills, 130.
- to make purchases, 144.

## NOTES—

- issue of, by bankers, 96, note (z).
- promissory. See PROMISSORY NOTES.

## NOTICE—

- of act of bankruptcy, effect of, on right to set-off, 562.
- on dealings with bankrupts, 665.
- of assignment of debts, shares, etc., necessary to take them out of the order and disposition of their assignor, 679.
- what amounts to 221, *et seq.*, 428, 679.
- how to be given, 221.
- casual knowledge not, 680, note (s).
- given by solvent partner and his copartner against whom a receiving order made, good, 625, note (x).
- by liquidator, 625, note (x).

## NOTICE (continued)—

- to one partner, when notice to the firm, 141, 142, 680.
- to a retired partner, 143.
- to an incoming partner, 143.
- to director, when notice to company, 680.
  - when not, 680.
- to clerks of fraud of partner, not notice to the firm, 143.
- of partnership, effect of as regards double proof, 748.
- that a person who holds himself out as a partner is not a partner, effect of, 40.
- to quit, may be given by one partner on behalf of firm, 279, 562.
  - of breach of trust, effect of, 143.
- of want of authority, effect of, 168, 175, 176.
- of fraud on firm, effect of, 169.
- that one partner will not be bound by acts of copartner, effect of, 168, 175, 176.
- of private stipulations of partners, effect of having, 173, 201.
  - of stipulations of partners limiting their liability, 176, 201.
- determining partner's agency by, 210.
- to dissolve partnership, 425, 571.
  - form of, 571.
  - partnership at will, 571.
  - under articles, 423-426.
  - when one partner is lunatic, 425.
  - withdrawal of, 426, 572.
- of dissolution or retirement.
  - necessity of, 211, 213.
    - when partner lunatic, 213.
  - when not necessary, 215.
    - in case of death, 211.
    - in case of bankruptcy, 212.
    - in case of the retirement of a dormant partner, 212.
  - stipulations as to, 426.
  - right to give, 214.
  - effect of, 215, 680.
    - where there is a continued holding out, 216.
    - as regards acts necessary to wind up the partnership, 217 *et seq.*
    - as regards the doctrines of reputed ownership, 679.
- of expulsion, 428.

## NOVATION, 239.

See SUBSTITUTION OF DEBTORS.

## NUDUM PACTUM—

- sharing profits, not losses, not, 64.
- abandoning right to look to outgoing partner for payment of a debt of the firm, not, 242.

## NUMBER—

- of persons who may be in partnership, 70, 101.
- effect of, on appointment of a receiver, 549.

## NURSERY GROUNDS—

- conversion of, by being used as partnership property, 333, 346.

## OFFICER—

- bill of exchange payable to, 180, note (a).
- public, presence of in action for dissolution, not sufficient, 462.
- See PUBLIC OFFICER.

## OFFICIAL APPOINTMENTS —

- held by a firm, 114.
- held by one partner, when partnership assets, 331.  
agreements as to, 414.
- liability of firm for acts of one partner, an officer, 160.
- See APPOINTMENT.

## OLD CUSTOMERS —

- notice of dissolution, how to be given to, 221, 222.

## OPTION —

- to become a partner, 20.  
position of person who has, 433.  
as regards creditors, 20, 21.
- to purchase share of partner, 423.  
sale ordered, when, 555.  
when to be declared, 424.
- in case of lunacy, 578, note (*m*).
- provision in articles as to, 424.

## ORDER (see JUDGMENT) —

- forms of, in partnership actions, 517, note (*n*).
- when sheriff seizes for separate debt, 362. And AD-  
DENDA.
- and disposition, 679. See REPUTED OWNERSHIP.

## ORDER OF DISCHARGE, 751.

- effect of, 752 *et seq.*
- joint orders, 753.
- refusal of, 753.
- status* of undischarged bankrupt, 754.

## ORIGINATING SUMMONS —

- right of creditor of firm to proceed against estate of deceased partner by, 598.

## OSTENSIBLE PARTNER —

- notice of retirement of, how to be given, 221.
- liability of, to person who knows he has no interest in firm, 173,  
175.
- See HOLDING OUT; NOMINAL PARTNER; QUASI-PARTNERSHIP.

## OUTGOING PARTNER —

- agreements as to purchase of share of, etc., 422 *et seq.*
- assignment of share by, 450.
- indemnity to, 450.
- right of to retire from firm, 573.
- See, also, RETIRED PARTNER.

## OUTLAWRY —

- of partner, effect of, 73.
- dissolves the partnership, 583.

## OUTLAYS AND ADVANCES —

- allowances for, 381. See, also, ADVANCES; ALLOWANCES; CON-  
TRIBUTION.
- useless, 382.
- useful but unauthorized, 383.
- by partner on account of debts not due, 382, note (*b*).
- on separate property of one partner and *vice versa*, 330 *et seq.*
- no allowance for expenses unless proved to have been in-  
curred, 384.

## lien for. See LIEN.

- of part owners for, 57, 60, 355.

## OVERDRAWINGS —

- interest on, when payable, 390.
- effect of, same as borrowing money, 132.
- See ACCOUNTS.

## OWNERS —

- consent of true, as regards reputed ownership, 682.

## PARLIAMENT —

- persons procuring act of, not partners, 23.
- share of partner, when qualification for vote for, 348.
- persons having privilege of, not exempt from bankruptcy law, 624, note (n).

## PAROL —

- evidence, admissibility of, where partnership in land, 51, note (n), 81.
- contract, by partner, who may sue on, 177.
- See EVIDENCE.

## PARTICULAR PARTNERSHIPS —

- distinguished from general, 49.
- shares in, presumptively equal, 350.
- See PARTNERSHIP.

## PARTITION, 555, note.

## PARSONS —

- his definition of partnership, 3.

## PARTIES —

- to actions. See ABATEMENT; ACTIONS.
- by and against partners. 264 *et seq.* And see ADDENDA.
  - on contracts, 273 *et seq.*, 280 *et seq.*
  - for torts, 278 *et seq.*, 283.
  - in respect of equitable rights, 283.
  - where a change in the firm, 284.
- between partners, 456 *et seq.*
  - for an account, 460. See ACCOUNT.
- by and against the executors of a deceased partner, 460, 461.
  - necessity of making surviving partners parties, 460, 597, 612.
  - by sub-partner, 460.
  - by mortgagee of share in mine, 461.
  - by assignee of partner's share, 461.
- for a dissolution, 460.
  - actions by some on behalf, etc., 265 *et seq.*, 461.
  - representation by public officer, 461.
- actions not seeking dissolution, 462.
  - nor division of assets, 463.
- for an injunction, 461.
- to rescind contracts tainted with fraud, 482.
- by some on behalf of themselves and others.
  - when allowable, 265, 459, 461.
  - identity of interest requisite in, 462.
- when trustee in bankruptcy of one partner a necessary party, 289.
- on action defeated for misjoinder or non-joinder, 264.

## PARTITION —

- not ordered instead of sale, 555.
- except in cases within the Partition Acts, 557.
- agreement for on dissolution, meaning of, 429.

**PARTNERS** (see **MANAGING PARTNER**) —

who may be. See **CAPACITY OF PARTNERS.**  
 by holding out, 40 *et seq.* See **HOLDING OUT.**  
 who are and who are not. See **ANALYSIS OF CONTENTS, Bk. I,**  
     and *infra*, **PARTNERSHIP.**  
 liabilities of, to creditors. See **ANALYSIS OF CONTENTS, Bk. II,**  
     and Bk. IV, ch. 2 and 3, and **LIABILITIES.**  
 mutual rights and duties of. See **ANALYSIS OF CONTENTS, Bk.**  
     **III and Bk. IV, ch. 2 and 3.**  
 rights and liabilities of, in the event of a dissolution. See **ANALY-**  
     **SIS OF CONTENTS, Bk. IV, ch. 1, 2 and 3.**  
 bankruptcy of. See Bk. IV, ch. 4. See **BANKRUPT PARTNER;**  
     **BANKRUPTCY.**  
 deceased. See **DECEASED PARTNERS.**  
 dormant. See **DORMANT PARTNERS.**  
 incoming. See **INCOMING PARTNERS.**  
 infant. See **INFANT.**  
 lunatic. See **LUNATIC and LUNACY.**  
 nominal. See **NOMINAL PARTNERS.**  
 ostensible. See **OSTENSIBLE PARTNERS.**  
 outgoing. See **OUTGOING and RETIRED PARTNER.**  
 retired. See **RETIRED PARTNER.**  
 promoters of companies not, 23, 24.  
 servants, when, 13.  
 rights of, depend on agreement and on conduct, 10, 12, 408.  
 members of mutual insurance societies not, 51.  
 co-owners, difference between and, 52.  
 not sureties of firm, 111.  
 both principals and agents, 111.  
 disabilities of, 116, 117, 624.  
 liability of, for acts of copartner before execution of articles, 202.  
     before joining firm, 202.  
 special agreements between. See **ARTICLES OF PARTNERSHIP;**  
     **IMPLIED POWERS.**  
 duties of, towards each other, not to be all found in partnership  
     articles, 406.  
 extent of liability at common law, 200.  
 high standard of honor to be observed by, 303. See **FRAUD;**  
     **GOOD FAITH; HONOR.**  
 actions by and against. See **ACTIONS.**  
 petition in bankruptcy by, 635. See **BANKRUPTCY.**  
 proof between, in bankruptcy.  
     against joint estate, 721.  
     against separate estate, 737.  
 execution against.  
     for debt of firm, 298.  
     for separate debts, 356.  
     See **EXECUTION.**  
 property of, 322 *et seq.* See Bk. III, ch. 4, and **ASSETS; PROPERTY.**  
     application of doctrines of reputed ownership to, 683. See  
     **REPUTED OWNERSHIP.**  
 right of, to dissolve partnership. See Bk. IV, ch. 1, and **DISSO-**  
     **LUTION.**  
 lien of, 351. See **LIEN.**  
 shares of. See Bk. III, ch. 5, and **SHARES.**  
 option to become, 20. See **OPTION.**  
 power to nominate, 21.  
 number of, limits to, 70, 101.

## PARTNERS (continued) —

may be registered as shareholders in the name of, 112.  
 legal proceedings between. See Bk. III, ch. 10, ACTIONS.  
 See, also, PARTNERSHIP.

## PARTNERSHIP —

meaning of the term, 1.  
 definitions of, 2.  
 ordinary and extraordinary, 4.  
 distinguished from corporations and companies, 4.  
 nature of contract of, 8 *et seq.*  
 distinguished from contracts of loan, 15, 16, 37 *et seq.* And  
 ADDENDA.  
 not having gain for their object, 2, 4, note (t), 50.  
 where agreement unconcluded, 19.  
 prospective, 19 *et seq.*  
 clause negating a, effect of, 11.  
 as regards third persons, 25 *et seq.* See Bk. I, ch. 1, § 2, and  
 QUASI-PARTNERSHIP.  
 in profits not necessarily a partnership in the assets by which they  
 are made, 14, note (x), 328.  
 what constitutes a, 10 *et seq.* See Bk. I, ch. 1.  
   in profits and losses, 10.  
   in profits only, 10-17.  
   evidence of. See Bk. I, ch. 4, 80 *et seq.* See EVIDENCE.  
 who may enter into, 71. See CAPACITY.  
 consideration for, 63. See CONSIDERATION.  
 general nature of, 110 *et seq.* See Bk. I, ch. 6.  
 principles of agency as applied to, 124. See IMPLIED POWERS.  
 capitals of, 320. See CAPITAL.  
 commencement of, 22.  
 duration of, 121 *et seq.* See Bk. IV, ch. 7. See DURATION OF PART-  
 NERSHIP.  
 dissolution of. See Bk. IV, ch. 1, and DISSOLUTION.  
 transfer of shares in, 363, 583. See TRANSFER OF SHARES.  
 retirement of partners from, 573.  
 expulsion of partner from, 574.  
 at will and for a term, 121, 413.  
 articles of, 406 *et seq.* See ARTICLES OF PARTNERSHIP.  
 articles to be drawn up, 22.  
 property of, 322 *et seq.* See Bk. III, ch. 4, and ASSETS; PROPERTY.  
   application of doctrines of reputed ownership to, 683. See  
   REPUTED OWNERSHIP.  
   nature of partners' interest in, 330. See SHARE.  
 general and particular, 49.  
 extent of, depends on agreement, 49.  
 in particular transactions, presumption of equality of shares in,  
 350.  
 management of affairs of, 301 *et seq.*  
 accounts, 396 *et seq.* See ACCOUNTS.  
 contracts of. See CONTRACTS.  
   rescission of, 482 *et seq.* See RESCISSION.  
   specific performance of, 475. See SPECIFIC PERFORMANCE.  
 actions on. See ACTIONS.  
 agreement for deed of, 411. See AGREEMENT.  
 illegal, 91. See Bk. I, ch. 5.  
 partnership with common partners. See CONNECTED FIRMS.  
 sub-partnership, 48.



**PARTNERSHIP** (continued) —

- compared with co-ownership, 52 *et seq.*
- premiums paid for, 64. See **PREMIUMS**.
- books of. See **BOOKS**.
- induced by fraud, 482. See **FRAUD**.
- proof in respect of, 739.

**PARTNERSHIP PROPERTY**, 323 *et seq.***PART OWNERS** —

- not partners, 52 *et seq.*
- lien of, 56, 60, 355.
- not each other's agents, 124, note (a).
- admissions of, 128, note (l).
- See **CO-OWNERS**.

**PART PAYMENT** (see **PAYMENT**) —

- effect of, as regards statute of limitations, 260.
- by continuing partner, effect of on retired partner, 263.

**PART PERFORMANCE** —

- excludes operation of the statute of frauds, 81, 83.

**PATENT** —

- agreements as to, 415.
- illegal partnerships in, 99.
- co-owners of, 62.
- partnership in working, 49.

**PATRONS OF HUSBANDRY** —

- not partners, 40, 50.

**PAUPER** —

- transfer of share to, when valid, 365.

**PAWNBROKERS** —

- illegal partnerships between, 99.

**PAYMENT** —

- into court, when ordered, 505.
  - before trial, 505.
  - after trial, 506.
  - effect of admissions as regards, 505.
- into court, evidence of partnership, 90.
- when a defense to an action for an account, 515.
- by one partner, 224, note (n).
  - when not allowed, as against the firm, 386, 387.
  - effect of as regards the statute of limitations, 260-262, 597.
- by paymaster-general to one partner, 135, note (n), 272, note (e).
- by receiver, 511.
- to one partner, 134.
  - of debt not due to firm, 134.
- to surviving partner discharges payer, 342, note (s).
- to bankrupt partners, validity of, 668.
- to agent by bill drawn in his name, 136.
- to one of several trustees, no discharge, 218, note (m).
- bona fide*, when protected, 665; and note (r).
- receipt for, not conclusive evidence of, 135.
- termination of liability by, 225.
- imputation of, 225 *et seq.* See **APPROPRIATION OF PAYMENTS**.

## PEACE —

declaration of, whether operates retrospectively, 72, note (*k*).

## PENAL STATUTES —

construction of, 95.

## PENALTIES —

reservation of in partnership articles, 454.  
action between partners for recovery of, 563.  
power of one partner to bind firm in, 143, 144.  
prohibitions under, 95.

## PERSONAL ESTATE —

partnership realty, when treated as, 343.  
when not, 347.  
shares in partnerships are, 343-346.  
actions between partners in respect of, 560.  
doctrine of reputed ownership as regards, 678.  
of bankrupt vests in trustee, 652.

## PERSONAL SERVICES —

partner cannot charge for, 880.

## PERSONS —

corporations when, 6, note (*d*).  
capable of being partners, 71. See CAPACITY.  
their number, 70, 101.  
their capacity, 71 *et seq.*  
meaning of, in Bovill's Act, 36.

## PETITION —

for adjudication in bankruptcy, 625, 633.  
by one partner against another, 635, 636.  
when improper, 636.

## PETITIONING CREDITOR —

in bankruptcy, 633.  
though joint, when entitled to rank as a separate creditor,  
731, and note (*u*).  
election by, to stand as a joint or separate creditor, 747.  
where public officer, 633, note (*z*).  
company, 633.

## PHYSICIANS —

partnership between, unqualified, 98.

## PLACE —

of business, should be stated in the articles, 412.  
right of majority to choose, 315.

## PLEDGE —

of partnership goods for private debt, 172.  
power of one partner to bind firm by, 139.  
after dissolution, 140, note (*c*), 218, 219.  
redemption of, 140.

## POLICIES OF INSURANCE —

not within doctrines of reputed ownership, 678.  
See, also, MARINE INSURANCE.

## POLLOCK —

his definition of partnership, 3.

## POSSESSION. See REPUTED OWNERSHIP.

## POTHIER —

his definitions of partnership, 3.

## POWERS —

conferred by articles of partnership, must be construed with reference to object of firm, 406, 407.

of majorities, 313. See MAJORITIES.

of partners, 124. See IMPLIED POWERS.

of expulsion, 574.

exercise of, 408, 426 *et seq.*

of management, 301.

to nominate partner, 21, 434.

agreements as to, 418.

of attorney.

construction of, 130. And see *Harper v. Godsell*, L. R. 5 Q. B. 422.

## PRACTICE (see ACTIONS; JUDICIAL PROCEEDINGS) —

of partners, importance of, 408, 409.

## PRECEDENTS —

of orders for account, 516, 517, note (n).

## PRE-EMPTION —

clauses giving rights of, 423.

when the partnership is continued after expiration of the term, 410, 411.

## PREMIUMS —

action for, where agreement to become partners broken, 559.

agreements as to, in partnership articles, 413.

apportionment of, 64-69.

recovery back of, 64 *et seq.*

in cases of fraud, 64.

in cases of illegality, 102.

where consideration has failed, 65.

where partnership ceases sooner than was expected, 65.

in event of bankruptcy, 67.

lunacy, 67.

death, 67.

disagreements, 68.

misconduct, 68.

what sufficient, 68.

where neither party is to blame, 65.

where no time for continuance of partnership was fixed, 66.

where for a term, 66.

where a partnership was only contemplated, 727.

where agreement made on dissolution, 66.

where no agreement, 67.

right to retain, on dissolution, 571, note (g).

amount to be returned, 68.

time when question should be raised, 69.

## PREROGATIVE —

of crown as regards forfeited shares, 340, 583, note (f).

## PRESUMPTION —

of equality of shares, 385.

of equality of loss, 12, 403.

## PRICE —

to be charged by one partner in account with firm, 306, 309.

## PRINCIPAL —

one partner holding himself out as, 179, 277, 281.  
 not bound by a contract known to be fraudulent, 148.  
 right of, to profits made by agent or sub-agent, 307, note (r).  
*bona fide* payment to, by agent, when protected, 665, note (r).  
 See AGENCY and AGENT.

## PRINCIPAL AND AGENT —

partner both, 111.

## PRIORITY —

debts entitled to, 599, n., 709, and note (z). See DEBTS.

## PRIVATE STIPULATIONS —

of partners, effect of having notice of, 173, 174, 176.

## PROBATE DUTY —

payable in respect of shares of partners, 347, note (a).

## PROCEEDINGS —

conduct of, where two actions of administration, 598, note (n).  
 stay of, on bankruptcy, 709.

## PROCESS —

service of, on partners, 272.

## PRODUCTION OF DOCUMENTS, 591 (see BOOKS; DISCOVERY; INSPECTION) —

rules as to, 503.  
 agreement precluding, 504.  
 belonging to persons not before the court, 503.  
 of books of account, 404, 537.  
 in constant use, 505.  
 to professional accountants, 504.  
 to agents, 505.

## PROFITS —

what are, 7, 394.  
 agreement to share, see Book I, ch. 1.  
   a test of partnership, 7, 12 *et seq.*  
   without sharing losses, 15 *et seq.*  
   in lieu of salary, 13, 390.  
   specific performance of, 477.  
 annuities payable out of, 435.  
   when no profits are made, 435.  
 annuities in lieu of, 28.  
 salary varying with, 13, 22, 28, 390.  
 liability incurred by sharing, 25 *et seq.*, 604, note (l).  
   origin of rule that those who share profits are liable to losses, 26.  
   modern alterations in the above rule —  
     by the judgment in *Cox v. Hickman*, 30.  
     more recent decisions, 31 *et seq.* And ADDENDA.  
     act of 28 and 29 Vict. ch. 86, 35.  
 distinction between sharing —  
   net and gross profits, 7.  
   profits and gross returns, 8, 17, 18, 28, 29.  
   profits and payments varying with them, 29.

PROFITS' (continued) —

- partnerships in profits, 12 *et seq.*
  - not necessarily a partnership in the assets by which they are made, 14, note (a), 328.
- presumption of equality of shares of, and losses, 12, 348, 385.
- how ascertained, 397.
- division of, 393.
  - payment of, out of capital, 394, note (e).
  - what divisible as, 394.
  - altering principles of division of, 319.
- exclusion of partner from share of, 395.
- share of, collaterally secured, 36, note (t).
- income tax payable in respect of what, 394, note (c).
- legatee of share in partnership entitled to, 620.
- no apportionment of, 621.
- account of, 401. See ACCOUNT.
  - agent must account for, 305, 307, note (r).
- partners must, 305 *et seq.*
  - when derived from use of partnership property, 309.
    - from dealings with the firm, 305.
    - from connection with the firm, 310.
    - from competition with the firm, 312, 419.
  - since dissolution, 435, 521, 614 *et seq.*
  - where the capital is lent at interest, 521.
  - where the traders are not trustees, 522.
  - where they are trustees, 523.
  - where some of the traders are trustees, 523 *et seq.*
  - rights of legatee against executors who are surviving partners, 528, 530, 534.
  - may take interest at five per cent. or profits, 531.
  - subsequent to bankruptcy, 648.
  - when share of deceased partner is not got in, 521.
- co-owners sharing, 18, 53.
- managers sharing, 10, 13.
- trustees sharing, 523 *et seq.*
- executors of deceased partners sharing, 604 *et seq.* See EXECUTORS.
- servants sharing, 13, 18, 390.
- if not drawn do not necessarily bear interest, 390.
- See, also, LOSSES.

PROFITS AND LOSSES —

- agreement to share, 10.
  - type of partnership, 7, 10.
  - restricted rights under such agreements, 10.
  - clauses negating partnerships in, effect of, 11.
- shared alike unless agreement to the contrary, 348, 385.
- partners' share of, how ascertained, 397.
- See PROFITS; LOSSES.

PROHIBITORY CLAUSES —

- in articles of partnership, 419.
- against carrying on trade, 436 *et seq.*

PROHIBITORY STATUTES —

- construction of, 95.

PROMISE —

- by one partner to pay debt, 136, 261.
  - effect of, as regards the statute of limitations, 261, 262, 511.
- to one partner to pay debt, 136, note (d).

## PROMISE (continued) —

- by creditor to discharge retired partner, 242.
- to pay out of certain funds only, effect of, 201.
- by one partner to provide for bill of exchange, 139.

## PROMISSORY NOTES —

- liability of partners on, 180, 187.
- effect of form of, 176 *et seq.*
- power of one partner to bind firm by, 129. See IMPLIED POWERS.
- authority to transfer, 131.
- joint and several, liability on, 187.
- action on —
  - by one partner against another, 565.
  - by partners, 274.
- injunction to restrain negotiation of, 542, note (b).
- issue of, by bankers, 96, note.
- instruments held to be, 187 *et seq.*
- given by continuing partner when binding on retired partner, 213 *et seq.*
- do not merge debt, 254.
- See BILLS OF EXCHANGE.

## PROMOTERS OF COMPANY —

- not partners, 23, 24.
- not impliedly liable to each other for services, 24, note (g).
- observations on liabilities of, 45.
  - extent of such liabilities, 206, 207, 385.
- liability of for acts done before they become promoters, 206.
- effect of admission by one as against the others, 88, note (o).

## PROOF —

- of partnership, 80 *et seq.* See EVIDENCE.

PROOF OF DEBTS, 707 *et seq.*

- in bankruptcy, 701 *et seq.*, 707 *et seq.*
  - liquidated, 707.
  - unliquidated, when, 707.
  - against executor for *devastavit*, 738, note (j).
  - against bankrupt partner. does not preclude creditor from having recourse to the estate of deceased partner, 250, 602.
  - by secured creditor, 602, 709 *et seq.*, 743.
  - by bankrupt trustee, 707.
  - by surety, 719.
  - by joint creditors, 720, 730.
  - by separate creditors, 728, 730.
  - by partners, 721, 737.
  - by firm, 707.
  - by company, 707.
- if bought up for less than their nominal amount, 663.
- on administration of estate of deceased partner, 597, 598.
- See BANKRUPTCY.

## PROPERTY —

- of partners, 322.
  - joint estate, what is, 323.
  - agreement of partners the true test, 323, 329, 414.
  - property paid for by the firm, belongs to firm, 323.
  - where not, 325.
  - secret benefits obtained by one partner, 307, 325.
  - ships, 324.
  - good-will, 327, 415, 439.

## PROPERTY (continued) —

## of partners —

- joint estate; money paid to one partner for his exclusive benefit, 325.
- property acquired after dissolution, 326.
- nature of partners' interest in, 339. See SHARES.
- devolution of, in case of death of partner, 341. See DEATH.
- to what extent personal estate, 343 *et seq.*
- sale of on dissolution, 429. See SALE.
- separate estate, 327.
  - property used for partnership purposes not necessarily partnership property, 14, note (x), 328.
  - property bought with the money of the firm, 329.
  - appointments, 331, 414.
  - stock in trade, 331.
  - furniture, 329.
  - lease, 330.
  - trade secrets, patents, etc., 415.
  - houses built on partnership property, 330.
  - lands farmed in common, 332.
  - joint tenants partners in profits, 332.
  - devisees of a trade and of land for the purpose of carrying it on, 333.
  - devisees of mines, 333.
  - land acquired for the purposes of trade, 333.
- conversion of joint estate into separate estate, and *vice versa*, 334 *et seq.*, 697.
- agreement of partners sufficient for, 334, 697.
  - if executed, 337, 697.
- evidence of such agreement, 700.
- dealings between one partner and the firm, 335.
- change of property on change in firm, 336.
- effect of fraud on, 338, 697.
  - of holding out on, 700.
  - of doctrine of reputed ownership on, 700.
  - continuance of lien on, 699.
- effect of in administering estates in bankruptcy, 697 *et seq.*
  - binds creditors, 335.
  - trustee in bankruptcy, 335, 697.
- belonging to firm, profits derived by use of must be accounted for to the firm, 309.
- sharing produce of, 17, 28, 29, 53, 347.
- vesting in trustee of bankrupt partners, 644, 646 *et seq.* See TRUSTEE IN BANKRUPTCY.
- actions between partners relative to. See ACTIONS.
- of the firm, agreements as to, 414.
- lien on. See LIEN.
- use of, evidence of partnership, 90.
- wrongful employment of, by trustee, liability for, 523 *et seq.*
- See ASSETS; CAPITAL.

## PROSPECTIVE —

- partnerships, 20, 80, 412.

## PROSPECTUS —

- application of doctrine of holding out to persons signing, 44.
- evidence of partnership, 89.

- PROTECTED TRANSACTIONS —  
under the Bankruptcy Act, what are, 630.
- PROTEST —  
effect of, as regards laches, 469.
- PRUSSIAN CODE —  
definition of partnership in, 3.
- PUBLIC —  
holding out as partner to, 40 *et seq.* See HOLDING OUT.  
mode of giving notice of dissolution to, 214, 222, 223.  
See NOTICE.
- PUBLIC OFFICES —  
partnership for sale of, illegal, 92.
- PUBLIC OFFICER —  
bill of exchange payable to, 180, note (a).  
presence of, in action for dissolution, insufficient, 462.  
company entitled to sue by, may petition under Bankruptcy Act,  
633.  
proof in bankruptcy by, 739.  
See ACTION.
- PUBLIC POLICY —  
partnerships opposed to, 92.
- PUBLISHER AND AUTHOR, 14.  
See AUTHOR AND PUBLISHER.
- PUFFENDORF —  
his definition of partnership, 3.
- PURCHASE —  
partner may, his copartners' share, 313.  
option of, of copartners' share, 423.  
how declared, 424.  
enlarging time for, 424.  
of share of partner sold under a *fi. fa.*, 340, 356 *et seq.* See EXECUTION.  
See, also, SALE OF SHARES.  
of goods —  
by one partner for firm, 144.  
from firm, duty to disclose in case of, 306.  
for resale and division of produce, 53.  
See SALE.
- PURCHASER —  
protected in case of bankruptcy when, 625, note (f).  
See PURCHASE.
- QUARRELS —  
dissolution in case of, 581.  
inferred from, 572.  
injunction in cases of, 543.
- QUARRIES (see MINES) —  
who are partners in, 54.  
partner in, has no power to bind copartners by bills, 130.



## QUASI-PARTNERSHIPS, 25.

meaning of, 9.

evidence of, 83 *et seq.*

by sharing profits, 25.

distinction between sharing profits and gross returns, 26, 29.  
and payments varying  
with them, 29.

alteration in law as to, by *Cox v. Hickman*, 30 *et seq.*

by holding oneself out as a partner, 40 *et seq.*

effect of doctrine on deceased partner, 605.

effect of knowledge that a person who holds himself out as a  
partner is not a partner, 40, 41.

effect of fraud, 41, 42.

what constitutes a holding out, 42.

where name is concealed, 42, 45.

holding out must be to the plaintiff, 42, 43.

authority to hold out, 42, 43.

holding out by retiring partner, 45.

by surviving partner, 46.

by bankrupt partner, 212, 667, 700.

application of doctrine to inchoate partnerships, 44.

holding out, a question of fact, 44.

not in cases of tort, 47.

bills of exchange of, 181. See **BILLS OF EXCHANGE**.

See, also, **HOLDING OUT**.

## RACE-HORSE —

co-owners of, not partners, 14, 18, 51.

## RATIFICATION —

effect of, 143, 148.

what constitutes, 143, 148.

knowledge essential to, 143.

when possible, 148, note (a).

in case of torts, 148.

by firm, of guarantee, 138.

of submission to arbitration, 129.

by partners, effect of in settling accounts, 387, 388.

by infant, 76.

of deed executed by one person for another, 137, note (i).

## REAL ESTATE —

when firm property, 332.

actions between partners relating to, 560.

of firm, devolution of, in case of death of partner, 341.

treated as personalty, 332, 343.

## RECEIPTS —

of one partner, when binding on firm, 135, 152, 270,

not conclusive evidence of payment, 135.

by surviving partner discharges debtor to firm, 342, note (s).

given to one partner does not discharge copartners, when, 239.

not entering, a ground for dissolution, 581.

## RECEIVER —

object of having a, 545.

cannot carry on business unless appointed manager, 545. See  
**MANAGER**.

when appointed, 545.

in actions not seeking a dissolution, 545.

defendant entitled to, before judgment, 549.

**RECEIVER (continued) —**

- not refused because no dissolution is prayed, 546.
- difference between granting an injunction and appointing a receiver, 547.
- appointment of, operates as an injunction, 538.
- effect of payment by, on statute of limitations, 511.
- delivery of partnership books to, 554.
- refused, though an injunction is granted, 547, note (*g*), 549.
  - on ground of laches, 469.
- against creditor of solvent partner at suit of trustee in bankruptcy, 549.
  - executors, 548.
  - partners, 547.
  - non-partners, 548.
  - surviving partner, 548, note (*m*), 550.
  - a mortgagee, 553.
  - co-owners, 59, 62.
- influence of the number of partners on the appointment of, 549.
- grounds for the appointment of, against a partner, 550.
  - agreement, 550.
  - misconduct, 550.
  - fraud, 551.
  - exclusion of copartner, 551.
    - where partner excluded is also a mortgagee, 553.
  - denial of partnership, 552.
  - illegality of partnership, 552.
- effect of Judicature Acts on appointment of, 546.
- of mines, 53, 552.
- in case of lunacy, 553.
- appointment of partner to be receiver, 553.
  - of solvent partner on bankruptcy, 670.
- order appointing receiver, 553.
- security to be given by, 553.
- interfering with, a contempt of court, 538, 539, 554.
- right of arbitrator to appoint, 454.
- appointment of, on breach of agreement as to getting in debts, 448.
- action by, for recovery of money to be distributed by him, 569, note (*m*).
- execution on judgment where a, 300, note (*e*), 359.

**RECEIVING ORDER —**

- petition for, 625.
- against the firm, effect of, 637.
- See **BANKRUPTCY**.

**RECITALS —**

- in releases, 238.
- evidence of partnership, 90.

**REDEMPTION —**

- implied power of partner to redeem, 140.

**REDUCTION OF CAPITAL —**

- partner can not make, without consent, 321.
- See **CAPITAL**.

**REFERENCE —**

- to arbitration, agreements for, 451. See **ARBITRATION**.
  - action on, 451, note (*o*).
  - power of partner to make, 129.
  - ratification of copartners, 129.

REGISTERS —

evidence of partnership, 85, 90.

REGISTRATION —

associations not requiring, 50, note (*f*), 101, note (*i*).  
 of firm name equivalent to use, 114.  
     as shareholders, 112.  
     as owners of copyright, 112. \*  
 of deeds of arrangement, 756.

REIMBURSEMENT —

right of, for expenses, 371, 381.  
 See CONTRIBUTION; OUTLAYS.

RELATION BACK —

of the title of trustee in bankruptcy, 663. See TRUSTEE IN BANKRUPTCY.  
 general doctrine of, 663 *et seq.*  
 as regards *bona fide* dealings without notice of act of bankruptcy, 665.  
 consequences of doctrine of, as regards —  
     dealings with bankrupt partners, 666.  
     dealings with solvent partners, 669.  
     execution creditors, 674.  
 in case of compositions in bankruptcy, 755.  
 of partnership articles, 88, 412.

RELEASE —

setting aside, 145.  
 must be set aside before account stated is re-opened, 514.  
 a defense to action for account, 516.  
 by one partner, 135, 145.  
 of one partner, effect of, 237, 241.  
 effect of recitals in, 238.  
 by removing seal, 238.  
 by arrest, 238.  
 by merger of securities, 254, 703.  
 by substitution of debtors, 239.  
 of drawer of bill, does not discharge the acceptor, 238.  
 in form, held to be only a covenant not to sue, 237.  
 evidence of partnership by a, 90.  
 difference between, and assignment as regards stamp duty, 450.  
 See LIABILITY.

REMAINDER-MAN. See TENANT FOR LIFE.

REMOVAL —

of seal, release by, 238.  
 of goods, within protecting clauses, 681.

REMUNERATION —

by share of profits, 35 *et seq.* See PROFITS.  
 for services, 380.  
     after dissolution, 381.  
 of trustee in bankruptcy, 694.

RENEWAL OF LEASE (see LEASE) —

by one partner, inures to benefit of firm, 307.

RENT —

action for, by one partner against another, 565.  
 power of one partner to distrain for, 137.

## REPAIRS —

liability of co-owner for, 60. And see ADDENDA.

## REPRESENTATIONS —

of one partner, when binding on firm, 146, 162 *et seq.*  
 by partner that debt is due, effect of on liability of firm, 260, 261.  
 by one partner that he is acting for himself alone, effect of, 281.  
 by one partner as to the extent of his authority, 165, 168, 481,  
 note (p).  
 as to nature of business, 166.  
 See FRAUD; MISREPRESENTATION.

## REPUDIATION —

of partnership induced by fraud, 479 *et seq.*  
 by infant, 75.  
 See FRAUD; RESCISSION OF CONTRACT.

## REPUTED OWNERSHIP —

general doctrines of, 676 *et seq.*  
 effect of customs of trade on, 677, note (y).  
 property subject to, 678 — must be  
 in order and disposition, 679.  
 in trade or business, 680.  
     at time of bankruptcy, 681.  
     with consent of true owner, 681.  
 doctrine of, does not apply to *bona fide* dealings, etc., without  
 notice of —  
     an act of bankruptcy, 681, 682.  
     as to notice, 679.  
 application of doctrine of, to —  
     ships, 678.  
     choses in action, 678.  
     shares in companies, debts, policies, etc., assigned without  
     notice, 678, 679.  
     property in possession for lawful purpose, 682.  
     or by virtue of custom of trade, 682.  
     trust property, 683.  
     property held for specific purpose, 683.  
     partnership property, 684.  
         when a change in the firm, 685.  
     debts assigned to continuing partners, 685.  
     property in the possession of a surviving partner, 687.  
         dormant partners, 689.  
 effect of, on lien, 684.  
     on separate estate of bankrupt partner, 684, 732.  
     on joint estate of firm, 684.

## RESCISSION OF CONTRACT —

on the ground of fraud, generally, 163, 479 *et seq.*  
     *in toto* or not at all, when, 490.  
     where a third party intervenes, 490.  
     not for every fraud, 479-481.  
         fraud must be on some material point, 481.  
         and have been relied on by the plaintiff, 481.  
         though plaintiff might have ascertained the truth, 483.  
         loss of right to rescind, 467, 490.  
 bad bargains not set aside except for fraud, 485.  
 of contracts of partnership on the ground of fraud.  
     general right to, 482.  
     for false representations, 482.

**RESCISSION (continued) —**

- of contracts of partnership on the ground of fraud —
  - plaintiff may sue for dissolution in the alternative, 491.
  - instances of, in the case of partners, 482, 483.
- of bargains between outgoing and continuing partners, 484, 485.
- of bargains between surviving partners and the executors of a deceased partner, 487.
- of bargains made on dissolution, 484.
- on failure of consideration. See **CONSIDERATION**.
- by infant, 75.
- indemnity in case of, 484.
- extent of indemnity, 484.
- lien on assets for purchase money in case of, 485.
- And see **FRAUD**; **CONTRACT**.

**RESIDENCE —**

- of partners, effect of on partnership in time of war, 72, 73.

**RESTRAINT —**

- of trade, 436, 437, and note (o).

**RETAINER —**

- of solicitors, as evidence of partnership, 84, note (r).
- by surviving partner, executor of deceased, of balance due on the partnership account, 490.
- of one partner, 146.

**RETIRED PARTNER —**

- actions by and against, 286.
- liability of, to creditors, 201 *et seq.*, 242 *et seq.* See **LIABILITY**.
- for future acts of firm, 210 *et seq.*
- for past acts, 223.
- discharge of —
  - by agreement with creditors, 239.
  - by notice, 210. See **NOTICE**.
  - death, 211. See **DEATH**.
  - bankruptcy, 212. And see **BANKRUPTCY**.
  - payment, 225.
  - release, 237.
  - lapse of time, 257.
  - dealings of creditor with remaining partners, 242 *et seq.*
  - and incoming partners, 211, note (a), 245, 248.
  - fraud of creditor, 249.
  - when not affected by notice given to others, 143.
  - how affected by doctrines of reputed ownership, 665 *et seq.*
  - by doctrine of holding out, 45, 216.
- rescission of agreements made by and with, 484 *et seq.*
- right of, to indemnity from the continuing partners, 450.

**RETIREMENT —**

- of partner, agreements as to, 422.
- effect of, on liability, 212.
- accounts on, 514.
- account of profits made after, where capital continued in the firm, 521 *et seq.*
- See **RETIRED PARTNER**.
- dissentient partner not bound to retire, 317.
- right of —
  - from partnership, 573.
- See **ARTICLES OF PARTNERSHIP**; **RESCISSION OF CONTRACT**; **SPECIFIC PERFORMANCE**.

## RETROSPECTIVE —

- articles, effect of, 88.
- partnership, 412.
- See RELATION BACK.

## RETURN —

- of premium, 64 *et seq.* See PREMIUM.
- of goods sold to firm on credit, 144.

## REVENUE LAWS —

- breach of, by one partner, effect of, 149.
- illegality of partnership infringing, 95, 99, note (s).
- contribution in cases of breach of, 378.

## REVOCAION —

- of agent's authority, effect of, on his right to indemnity, 371.
- of partner's authority, 170, 210.
- of submission to refer, effect of, 452.

## RIFLE CORPS —

- liability of officers of, for clothing of, etc., 50, note (k).

## RIVALRY —

- between partner and firm, 309 *et seq.*

## RUTHERFORD —

- his definition of partnership, 3.

## SAILORS —

- sharing produce of voyage not partners, 19.

## SALARY —

- varying with profits, 13, 18, 35. See WAGES; PROFITS.
- share of profits in lieu of, 13, 18, 22.
- partner's right to, for extra work, 381.

## SALE —

- by one partner, when binding on firm, 146, 569.
  - when actionable by copartner, 568.
  - when made after dissolution, 217, 218.
    - bankruptcy, 671.
- by partner to firm, 305 *et seq.*
- action between partners for care of produce of, 568.
- of business, effect of, on vendor's right to carry on the business
  - sold, 440, 558. See GOOD-WILL.
- on dissolution —
  - partner's right to, 555.
  - order for, 555.
  - when dispensed with, 556.
  - agreements as to, 556.
  - partition instead of, when, 555, 557.
  - mode of selling, 557.
  - conduct of, 558.
  - leave to bid at, 558.
  - of good-will, 558.
  - of pending contracts, 558.
  - valuation of unsalable appointments, 558.
  - directed before trial, 559.
- of shares of partners —
  - rights of purchaser, 358, 363.
- causes a dissolution, 359, 363, 583.

SALE (continued) —

- under *fi. fa.*, 356.
  - may be by private contract, 358.
  - since the Judicature Acts, 361 *et seq.*
- duty of sheriff, 356.
- right of purchaser, 358.
- position of execution debtor, 359.
- co-owners, right of to, 62, 557.
- agreements as to, 422, 423.
- notice of, how given, 423.
- by executors of deceased partner to surviving partners, 593.
- when an act of bankruptcy, 627 *et seq.*
- See, also, PURCHASER; TRANSFER OF SHARES.

SAVINGS BANKS —

- debts owing to, no priority, 709, note (z).

SCHEMES —

- of arrangement, 754 *et seq.*
- effect of, 755.
- registration of, 756.

SCRIVENER —

- solicitor not, 156.

SEAL —

- removal of, from bond, effect of, 238.

SECRETS —

- trade, provisions in articles as to, 415.

SECRET BENEFITS —

- obtained by one partner must be accounted for to firm, 305 *et seq.*, 325.
- actions for account of, 495.

SECRET PARTNER —

- what constitutes, 27 *et seq.*
- liability of, 178.
- See DORMANT PARTNER.

SECRET SERVICE MONEY —

- no allowance to partners for, 383, 384.

SECRETARY —

- notice to, when sufficient, 680, note (s). See NOTICE.
- for time being, actions by, 458.
- See PUBLIC OFFICER.

SECURED CREDITORS —

- proof of debts by —
  - in bankruptcy, 709 *et seq.*
  - in respect of bills secured by equitable charge on goods, 709.
  - See, also, BILLS OF EXCHANGE.
- splitting demands by, 749.
- cases in which, can prove and retain security, 715.
- in administration by the high court, 602.

## SECURITIES —

- of firm, effect of change of partners on, 119.
- merger of debt by taking, 254, 703, 704.
- effect of possessing, as regards the right to prove against bankrupt partners, 714.
- as regards right to split demands, 749.
- discharge of retiring partner by taking, from continuing, 244, 253.
- position of secured creditors in bankruptcy, 709 *et seq.*
- in administration in the high court, 602.
- as to appropriation of, to interest, 720, note (n).
- 28 and 29 Vict., ch. 86, does not deprive a lender of his, 37, 38.
- substitution of, effect of on liability of firm, 239.

## SECURITY —

- power of partner to take, 141.
- to give, 138, 139.

## SEPARATE ADJUDICATION. See BANKRUPTCY.

## SEPARATE BUSINESS —

- profits derived from, 305 *et seq.*, 310 *et seq.*, 419.

## SEPARATE CREDITORS —

- proof by, in bankruptcy, 692, 728.
- against the joint estate, 721 *et seq.*
- separate estates, 692, 729.
- becoming joint, 704 *et seq.*
- rights of, against estate of deceased partner, 610 *et seq.*

## SEPARATE DEBTS —

- what are, 702.
- bills given for, 171. See BILLS OF EXCHANGE.
- execution against partners for, 356. See EXECUTION.
- proof and payment of. See BANKRUPTCY; DECEASED PARTNER.
- effect of partner paying with money of the firm, 171.
- mortgage of joint estate to secure, when an act of bankruptcy, 631.
- cannot be set off against joint debts, 291 *et seq.*
- See JOINT AND SEVERAL.

## SEPARATE DIVIDENDS —

- declaration of, in bankruptcy, 693.

## SEPARATE ESTATE —

- what is, 322, 327, 697. See PROPERTY.
- property used for partnership purposes may be, 328.
- property bought with money of firm, 329.
- stock in trade, 329.
- houses built on partnership property, 330.
- trade secrets, patents, etc., 415.
- appointments, 331, 414.
- land, 331, 332, 333.
- conversion of, into joint, 334, 697.
- effect of doctrine of reputed ownership on, 684.
- distinct account of, to be kept in bankruptcy, 693.
- consolidation of, with joint estate, 695.
- proof against, 729.
- where firms, with common partners, 693.
- by joint and separate creditors, 729, 730.
- by partner in administration action, 599.



SEPARATE ESTATE (continued)—

- distribution of surplus of, 730.
- cannot be treated as joint estate because in the order and disposition of the firm, 686, 732.
- mortgage of, to joint creditors invalid, when, 632.
- costs and remuneration of trustee, when paid out of, 694.
- See, also, BANKRUPTCY; PROPERTY.
- of married women,
  - liability of, 78, 624, note (n), 691, note (b).
  - rights of, who have lent money to husbands for their business, 730.

SERVANTS —

- power of one partner to hire and dismiss, 147, 419.
- liability of firm for negligence of, 149.
- right of, to account, 493.
- payment of, by share of profits, 13, 390.
- when partners, 13, 28.
- possession of, effect of as regards reputed ownership, 679.

SERVICE OF WRITS, ETC.—

- on firm, 266.
- on one partner, when sufficient, 272.
- on foreign firms, 266, note (o).
- on lunatic partner, 266, note (o).

SERVICES —

- right of partners to compensation for, 380. See ALLOWANCES.

SET-OFF —

- by and against partnerships, 290.
- combined effect of rules at law and in equity, 191.
  - effect of changes in firm and assignment of debt on right of set-off, 292.
- agreed to be allowed by one partner, 296.
- where there is a dormant partner, 294.
- cases where one partner only has been dealt with, 235.
- attempt to avoid, by suing one partner, 296.
- against assignee of debt after notice, 296, note (b).
- by way of counter-claim, what may be, 290.
- where there has been an assignment, 295.
- legacy to partner indebted to testator, 620.
- in bankruptcy, 654 *et seq.*
  - tendency to allow, 655.
  - not allowed where excluded by agreement, 656.
  - right of, exists independently of intention, 657.
  - only debts or claims capable of proof can be, 658.
  - where bills are returned dishonored, 657.
  - where the debts are not yet due, 657.
  - simple contract debts with specialty, 657, 658.
  - damages against debts, 658.
  - where debt secured, 658.
  - the cross-demands must be money demands, 658.
  - and mutual, 659.
  - and contracted before notice of an act of bankruptcy, 662.
  - buying up bills of bankrupt for purposes of, 669.
  - See BANKRUPTCY.
- joint demands cannot be set off against separate demands or *vice versa*, 269, 291-294, 660.

## SET-OFF (continued) —

- agreement to set off joint debt against separate, 269, 294, 661.  
where one partner only is bankrupt, 659.
- as regards sureties, 661.
- by and against surviving partners, 290.

## SETTING ASIDE —

- releases given by one partner, 145.
- See, also, FRAUD; RESCISSION OF CONTRACT.

## SETTLED ACCOUNT. See ACCOUNT STATED.

## SETTLEMENT —

- of shares in partnership, 434.

## SHARE IN PARTNERSHIPS —

- nature of a share, 339.
  - share a right to money, 339.
  - whether qualifies for vote, 348.
- transfer of, consent of all partners requisite to, 363.
- legacies of, 610, 619.
- mortgage of, 48, 341, 493.
- assignment of, 583.
- jus accrescendi inter mercatores locum non habet*, 340.
- shares are personal estate, 343.
  - not interests in land, 333 *et seq.*
    - within the statute of frauds, 348.
    - are within the Mortmain Acts, 348.
  - how far goods and chattels, 348.
- forfeiture of to crown, 340.
- agreements as to. See ARTICLES OF PARTNERSHIP.
- amount of each partner's share, 348 *et seq.*
- presumption in favor of equality, 348.
  - evidence *contra*, 350.
  - application of rule to shares in particular transactions, 350.
  - where one firm comprises another, 351.
- not within doctrine of reputed ownership, 678.
- action by partner for. See ACTIONS BETWEEN PARTNERS.
- lien on shares. See LIEN.
- mode of taking shares in execution. See EXECUTION.
- sale of. See SALE.
- transfer of does not get rid of liability, 240. See TRANSFER OF SHARES.
- forfeiture of, 574. See EXPULSION.
- surrender of, 573. See RETIREMENT.
- settled, 434.
- right of one partner to purchase his copartner's, 313.
- locality of, 340, note (d).

## SHARES IN COMPANIES —

- registration of in name of firm, 112.
- power of partner to take, for security for debt to firm, 141.
- trustee of, right to indemnity against calls, 375.
- vest in trustee of bankrupt partner, 652.
- not within doctrine of reputed ownership, 678.

## SHAREHOLDERS —

- liability of to contribute to losses of company, 377.
- proof against estate of by company, 739.
- bankruptcy of, how far dissolves company, 649, 650.

## SHARING PROFITS —

*quasi*-partnership by, 25–30. See PARTNERSHIP; PROFITS; QUASI-PARTNERSHIP.

## SHERIFF —

how to execute *fi. fa.* for separate debt of one partner, 356.  
 action against, for share of money received by, on sale of partnership property, 568.  
 right of purchaser from to an account, 493.  
 injunction against, at the suit of partners, 359.  
 effect of seizure and sale by, if followed by bankruptcy, 674, 675, 709, note (b).  
 what can be seized by, as share of partner, 340.  
 form of order on sale by, 362. See Seton on Decrees, 1214, ed. 4.  
 See, also, EXECUTION.

## SHIP —

ownership of, 324.  
 registration of, 324.  
 part owners of, 60.  
     liability of, for acts of each other, 147, note (y).  
     when not entitled to share profits made by, 470.  
     lien of, 355.  
 profits derived from use of partners', belong to firm, 309, 310.  
 powers of one partner as to, 324.  
 application of doctrines of reputed ownership to, 678.  
 transfers of shares in, 366.  
 managing owner of, right of to commission, 380, note (m).  
 injunction to restrain sailing of, *Miles v. Thomas*, 9 Sim. 606.

## SHIP'S HUSBAND —

partner acting as, for firm, 380, note (m).

## SLANDER —

injunction to restrain, 542, note (e).

## SLANDER OF TITLE —

to trade-marks, 595, note (c).

## SMUGGLERS —

partnership between, 93.  
 cannot maintain action for smuggled goods sold, 103.

## SOCIETIES —

friendly, not partnerships, 50.  
 not having gain for their object, 50.  
 in which each member acts for himself, 51.  
 See PARTNERSHIP.

## SOLICITING —

old customers, right of retiring partner to, 440, and note (g). See GOOD-WILL.

## SOLICITORS (see ATTORNEYS) —

are not scriveners, 156.  
 not part of their ordinary business to receive money for investment, 151, note (u), 156.  
 clerk may be articulated to two partners, *Re Holland*, L. R. 7 Q. B. 297.  
 evidence of, against their clients, 84, note (p).  
 summary jurisdiction over partners who are, 152, note (y).

## SOLICITORS (continued) —

- partnership between.
  - when jointly retained, 49.
  - when illegal, 100.
  - proof of, 84.
  - in particular transactions only, 478.
  - lien of, effect of change in firm on, 120.
  - dissolution of —
    - agreements as to client's papers on, 438.
    - effect of on client's papers, 120, 438.
    - in the case of dissolution by bankruptcy, 669.
  - liability of, for each other's acts, 163. And ADDENDA.
  - with respect to bills, 130.
    - misapplication of money, 151 *et seq.*
  - partner in firm of, no authority to borrow, 132.

## SOLVENCY —

- guaranties as to, when required to be written, 138, 165.

## SOLVENT PARTNERS —

- proof by, against bankrupt copartners, 721, 738, 740.
- actions by, 288, 289.
- trustee of bankrupt partner must be joined with, when, 289, 670.
- entitled to wind up business of the firm, 669.
- may sue on contracts without joining bankrupt, 289, 670.
- may sell partnership goods, 671.
- validity of acts of, not dependent on absence of notice of bankruptcy, 674.
- See BANKRUPTCY.

## SOME ON BEHALF —

- of themselves and others, 461. See PARTIES.

## SPECIAL AND GENERAL —

- partnerships, 49.

## SPECIALTY DEBTS —

- whether created by covenant to be true and just, 418, 419.
- may be set off against simple contract debts, 658.
- not entitled to priority, 709.

SPECIFIC PERFORMANCE OF AGREEMENTS, 475 *et seq.*

- for partnerships, 475.
- for an account, 477.
- in partnership articles, etc., 478.
- to take share at valuation, 432, 479.
- not to carry on business, 478.
- as to granting an annuity, 479.
- not to divulge secret, 479.
- as to sale of share, 479.
- as to custody of partnership books, 479.
- as to collecting debts, 448, 479.
- to refer to arbitration, 451.
- for a lease after term has expired, 476.
- to share profits, 477.
- laches of plaintiff, a bar to, 467.

## SPIRITUAL PERSONS —

- disabilities of, 71, note (e).
- may be partners, 71.

**SPLITTING DEMAND —**

by creditor of bankrupt partners, 749, 750. See **PROOF OF DEBTS**.

**STAKEHOLDER —**

illegality set up by, 106, 107.

**STAMP —**

on advertisements of dissolution, when necessary, 223.  
on assignment by outgoing partner to continuing partner, 450.  
on assignment of good-will, 439, note (a).  
on release, 450.

**STATED ACCOUNT.** See **ACCOUNT STATED**.

**STATEMENTS.** See **REPRESENTATIONS**; **MISREPRESENTATIONS**; **FRAUD**.

**STATUTE OF FRAUDS —**

effect of, on guaranty by one partner, 138.  
on contracts of partnership, 86, 96.  
share in cost-book mining company not within, 348.  
assumption of debts of old firm, 245, n.  
as a bar to an account, 508.

**STATUTES —**

limiting number of partners, 70, 101.  
regulating trades, 95, note (x).  
penal and prohibitory, 95.

**STATUTES OF LIMITATION.** See **LIMITATION**, **STATUTES OF**.

**STAYING PROCEEDINGS —**

at instance of one partner, 271.  
power of court of, under Bankruptcy Act, 709.  
See **INJUNCTION**.

**STEALING —**

indictment for, by surviving partners, 288, note (z).  
property of firm by partner, 456, 457, note (a).

**STIPULATIONS —**

as regards powers and conduct of partners, 418, 419.  
of partners with each other, effect of on third persons, 168 *et seq.*, 176.  
against loss, in partnership agreements, 15.  
See **AUTHORITY**; **NOTICE**.

**STOCK —**

wrongly sold by one partner, liability of firm for, 152, 153.

**STOCK-BROKERS (see BROKERS) —**

liability of firm of, for money misapplied by one partner, 153, 154.

**STOCKHOLDERS —**

of corporation, liability of as partners, 200, n.

**STOPPAGE IN TRANSITU —**

right of, against trustee in bankruptcy, 652, note (o).

**STORY —**

his definition of partnership, 3.

**STYLE —**

of firm, 413. See **NAME**.

**SUBMISSIONS TO ARBITRATION.** See **ARBITRATION**.

## SUB-PARTNERS —

- who are, 48.
- liability of to creditors of principal firm, 48.
- right of to account, 493.
- duration of partnership between, 132.
- parties to action by, 460, 461.

## SUB-PARTNERSHIPS, 48.

- duration of, 122.
- right to account in, 493.
- parties to actions relating to, 460, 461.
- bankruptcy proceedings, where major firm bankrupt, 637.

## SUBSCRIBERS —

- to inchoate companies, not partners, 24.
- right of, to have back their money where company is illegal, 106.
- actions by for the recovery of their subscriptions, 493, 499.

## SUBSCRIPTION —

- recovery of. See CONSIDERATION; PREMIUM.
- where partnership illegal, 106.

## SUBSEQUENT PROFITS —

- account of, when directed, 521, 614 *et seq.*
- right of trustee in bankruptcy to account of, 648.
- right of executors of deceased to share of, 592.

## SUBSTITUTION —

- of debtors, discharge of partner by, 239 *et seq.*
- effect of, in bankruptcy, 704, 705.
- can only be made with creditors' consent, 239, 705.

## SUCCESSION DUTY —

- on death of partner, 594.

## SUCCESSOR —

- to business, 440 *et seq.*
- appointment of, 434.

## SUICIDE —

- attempted, no ground for dissolution, 581, note (*d*).

## SUITS IN EQUITY. See ACTION.

## SUPERSEDING —

- adjudications of bankruptcy, 642, 643. See BANKRUPTCY.

## SURCHARGING —

- and falsifying accounts, 513. See ACCOUNTS.

## SURETIES —

- partners not, of firm, 111.
- to or for firm, position of on change in firm, 117 *et seq.*, 287.
- to or for company, position of on incorporation or amalgamation of company, 118.
- discharge of, by doctrine of appropriation of payments, 230.
- by judgment against principal debtor, 255, 256.
- application of doctrines of set-off to, in cases of bankruptcy, 661.
- proof by, in case of bankruptcy, 719, 745, note (*m*), 752.
- provisions of Mercantile Law Amendment Act, 119.
- right of, to contribution from co-sureties, 375, note (*d*).

**SURGEONS —**

partnership between, unqualified, 98.

**SURPLUS ASSETS —**

action for share of, 569.

distribution of, 402. See **ASSETS; BANKRUPTCY.**

**SURRENDER —**

of partner's share in property mortgaged, held to include firm's share, 362, note (o).

See **RETIREMENT.**

**SURVIVING PARTNERS —**

rights of, as against, and liability to, the executors of a deceased

partner, 443, 444, 493, 591.

to partnership property, 333, 341.

to good-will, etc., 443, 447.

to get in debts, 341, 342, note (s), 591.

to mortgage partnership property, 341.

to sell, 341.

as regards account, 613.

liabilities of —

to creditors of the firm, 341, 591, 595.

where the creditors are proceeding against the estate of the deceased, 288, 460, 598.

to the executors of a deceased partner, 341, 592, 593.

to the separate creditors, legatees and next of kin of a deceased partner, 612.

when the assets of the deceased are not got in, 614 *et seq.*

when they are lent to the firm, 618.

position of, when also executors, 528, 593.

account of subsequent profits against, 528.

right of retainer, 490.

actions by and against, 288. See **ACTIONS; PARTIES.**

proper parties to actions by joint creditors to administer the estate of a deceased partner, 460, 598.

not proper parties to actions by separate creditor against executors of deceased partner for an account, 612.

may be joined with executors of deceased partners as defendants, when, 603.

cannot render the estate of their deceased copartner liable for what occurs after his death, 46, 605.

injunction against, 541, 542.

to restrain use of old name, 605.

rescission of contracts between, and executors of deceased partner, 487, 488, note (n).

application of doctrines of reputed ownership to property in the possession of, 687, 689.

payment of debt to, discharges payer, 342, note (s).

agent of firm must account to, 288, note (y).

creditor looking for payment from, does not lose his right against estate of deceased, 250.

part payment of debt by, effect of as against estate of deceased partner, 263.

right to charge for expenses and services, 381, 382, note (y).

See **DEATH; DECEASED PARTNER.**

**SURVIVORSHIP —**

of the doctrine of, between partners, 340.

how far doctrine applies, 342.

not to societies not having gain for their object, 342.

## SURVIVORSHIP (continued) —

- devolution of legal estate in land, 341.
- equitable estate, 341.
- choses in action, 341.
- ordinary chattels, 342.
- shares, 343.
- good-will, 342, 443, 444.

## SUSPENSION —

- of bankrupt's certificate, 752, note (s).
- of proceedings. See STAYING PROCEEDINGS.

## TAXATION —

- of partners and partnership property, 111.

## TEMPER —

- interference of the court between partners on the ground of bad temper, 466, 550, 580.

## TENANT FOR LIFE —

- of share in partnership, 620.
- losses, how shared, as between remainder-man and, 621.

## TENANTS IN COMMON —

- purchases by persons as, 51 *et seq.*
- who are, and who are not joint tenants, 51, note (n).
- trustee of bankrupt partner and solvent partners are, 648, 669.
- remedies between, 57 *et seq.*
- action by one against the other for sale of common property, 568.
- are not partners, 51.
- may be partners in profits only, 331.
- of trade-mark, 62, note (g).
- See CO-OWNERS.

## TENDER —

- to one partner, 136.

## TERM —

- partnerships for a, 121.

## TERMINATION OF LIABILITY, 210-263.

- as to future acts, 210.
- as to past acts, 223.
- by payment, 225.
- by release, 237.
- by substitution of debtors and securities, 239.
- by lapse of time, 257.
- by agreement, 239.
- by death, 211. See DEATH.
- by bankruptcy, 212. See BANKRUPTCY.
- See, also, LIABILITY.

## THEATERS —

- illegal partnerships in, 101.
- not enforced, 102.
- lessee and manager of, sharing gross receipts of, not partners, 18.

## THIBAUT —

- his definition of partnership, 3.



**THIRD PARTIES —**

partnership as to. See **HOLDING OUT; QUASI-PARTNERSHIPS.**  
possession of, effect of, as regards doctrine of reputed ownership, 679.

**TIME —**

lapse of, when an answer to an action, 466.  
when a bar to an action for account, 508.  
discharging partners from liability, 257 *et seq.*  
right of partner to charge for, 380, 382, note (y).  
See **LACHES; LIMITATION, STATUTE OF.**

**TITLE —**

recognition of, effect of on defense of laches, 474.  
slander of, action for, 595, note (c).

**TORTS —**

actions by partners for, 278.  
against partners for, 283.  
of agent, liability of principal for, 147.  
of partner, liability of firms for, 149 *et seq.*  
of estate of deceased partner for, 595, and  
note (c).  
of retired partner for, 47, 214.  
impose joint and several liabilities, 198.  
when provable in bankruptcy, 708. note (y).  
doctrine of holding out, not applicable to, 47.  
contribution in respect of, 377 *et seq.*  
and breaches of contract, distinction between, 198, 199.

**TOWN CLERKS —**

partnerships between, 100, note (t).

**TRADE —**

covenants in restraint of, 437, note (o).  
direction by testator to carry on, effect of, 610.  
customs of, effect of on doctrine of reputed ownership, 677,  
note (y).  
on rights and liabilities of principal, 370,  
note (l), 372, note (t).

**TRADERS —**

distinction between, and non-traders, how far important, 624.  
reputed-ownership clause applicable to only, 625.  
as to executions against, if followed by bankruptcy, 674.

**TRADE-MARK —**

name of a firm, 114.  
may be assigned with good-will, 114.  
registration of, 114.  
tenants in common of, 62, note (g).  
part of good-will, 447.  
action for slander of, title to, 595, note (c).  
See **NAME.**

**TRADE NAME. See NAME.**

**TRADE SECRETS —**

agreements as to, 415.

**TRANSFER OF DEBT —**

- from account of old firm to account of new firm, effect of on creditor, 239 *et seq.*, 241, 242, 250, 253.
- from one account to another, assent by one partner, 135.

**TRANSFER OF INTEREST —**

- a ground for dissolution, 583.
- See **TRANSFER OF SHARE**.

**TRANSFER OF LIABILITY —**

- by substituting debtors, 239. See **LIABILITY**.

**TRANSFER OF SHARE —**

- by co-owners, 52.
- by partners, 363, 583.
  - necessity of consent of partners to, 363.
  - to representatives of deceased partners, 363.
  - effect of, 363.
    - on continuity of firm, 365, 366.
    - on liability, 240.
    - as regards dissolution, 583.
      - account, 364.
    - where right to assign, 365.
  - rights of transferee, 365.
  - in mining partnerships, 55, 366.

**TREASURER —**

- for time being, action by, 453.
- See **PUBLIC OFFICER**.

**TREATING CUSTOMERS —**

- allowance to partner for, 380, note (*n*).

**TRESPASS —**

- by one partner against another, 562.

**TROUBLE —**

- right of partners to compensation for, 380.
- executors and surviving partners, 592.

**TROVER —**

- by assignees of bankrupt partner against purchaser from solvent partners, 671.
- by one partner against another, 562, 568.

**TRUE OWNER —**

- who is, within the meaning of the reputed-ownership clause, 682.
- See **REPUTED OWNERSHIP**.

**TRUSTEE —**

- surviving partner, how far, 521 *et seq.*, 528.
- sharing profits, liabilities of, 28, 523.
- when bankrupt, should prove against his own estate, 707.
- authorized to lend money to firm, 113.
- unauthorized lending by, liability for, 523 *et seq.*
- of creditors' deeds, how far partners, 21.
- right of, to indemnity, 373, 374.
  - where two funds in the hands of the trustees, 373, note (*e*).
- application of doctrine of reputed ownership to, 683.
- liability of for profits made by trust fund, 523.
- payment of one of several, no discharge, 218, note (*m*).
- See **PROFITS, ACCOUNT OF; BREACH OF TRUST**.

## TRUSTEE IN BANKRUPTCY —

1. Generally.
  - choice of, 644.
    - right of joint and separate creditors, 645.
  - of joint estate is also trustee of separate estate, when, 637, 644.
  - appointment of inspectors to protect creditors, 645.
  - property vested in, 646. See BANKRUPTCY.
  - may disclaim onerous property, 651.
  - when not bound by the acts of the bankrupt, 659.
  - relation back of title of —
    - generally, 663 *et seq.*
    - as regards *bona fide* dealings without notice of act of bankruptcy, 664.
    - what transactions excepted, 664, 665.
    - consequences of, as regards —
      - dealings with bankrupt partners, 666.
      - dealings with solvent partners, 669.
      - execution creditors, 667.
  - set-off against, 660. See SET-OFF.
  - lien of partners good against, 647.
  - bound by agreement of partners as to their property, 335.
    - and other like agreements, 485.
  - rescission of agreements by, 486.
  - has no right to property of which the bankrupt is trustee, 652.
  - cannot sue for debts owing to the bankrupt as trustee, 652, 653.
  - joinder of, when necessary, 289.
  - injunction against, 542.
  - receiver appointed against, or on application of, 548.
  - remuneration of, 694.
  - costs and expenses of, 694.
2. Of a bankrupt partner —
  - does not become a partner, 648, 649, 669.
  - becomes tenant in common with solvent partner, 648, 669.
  - takes his share only, 647.
  - how far bound by agreement that share shall be taken at a valuation, 647.
  - right of —
    - to interfere with the solvent partners, 669.
    - to the partnership books, 669.
    - to bring actions in the names of the solvent partners, 670.
    - to join solvent partners in suing, 289, 670.
    - to wind up the affairs of the firm, 670.
    - to an account, 493, 648.
    - to institute a creditor's action against the executors of a deceased partner, 648.
    - to avoid fraudulent preference by the bankrupt, 269.
    - to recover property sold by the solvent partners, 671.
    - profits after bankruptcy, 648.

## TRUSTEE OF DEED OF ARRANGEMENT —

- appointment of, 755.
- separate estates as well as joint vest in him, when, 755. See ARRANGEMENT.
- relation back of title of, 755.

## TRUST PROPERTY —

- does not pass to trustee in bankruptcy, 652, 683.
- not affected by doctrine of reputed ownership, 683.
- following, 162.
- liability of partners for, 160 *et seq.* See BREACH OF TRUST.
- wrongful employment of by trustee, liability of for, 623 *et seq.*

## TRUSTS —

- to pay debts, effect of on statute of limitations, 260.  
when an act of bankruptcy, 631.
- breach of, effect of statute of limitations on, 260, 511.
- illegal, actions for execution of, 108.
- to carry on business, effect of as regards executors and trustees,  
606.  
creditors, 606, 607.

See BREACH OF TRUST; TRUSTEE.

## UNAUTHORIZED ACTS —

- adoption of by firm, 388.
- indemnity in respect of, 371 *et seq.*, 382.
- liability of firm for, 167 *et seq.*
- effect of notice of want of authority, 168.
- See RATIFICATION.

## UNCERTIFICATED BANKRUPT —

- as to whether he can be made bankrupt, 639.

## UNCONCLUDED AGREEMENT —

- partnership not the result of, 19.

## UNDERWRITERS —

- illegal partnerships between, 97, 98.

## UNDISCLOSED PRINCIPAL —

- action by, 177.
- against, 275, note (s).

## UNINCORPORATED COMPANIES —

- with transferable shares, when illegal, 101.
- subject to Bankruptcy Act, 623, 633.
- effect of bankruptcy of one member of, 650.
- proof by against estate of shareholder, 739.
- joint-stock companies. See last chapter.

## UNIVERSAL PARTNERSHIP, 49.

## UNLIMITED LIABILITY —

- common-law doctrines as to, 200 *et seq.* See LIABILITY; LIMITED LIABILITY.

## UNQUALIFIED AND QUALIFIED PERSONS —

- partnerships between. See ILLEGAL PARTNERSHIP.
- attorneys, 100.
- brokers, 97.
- medical practitioners, 98.

## UNREGISTERED PARTNERSHIPS —

- number of persons who may be partners in, 70, 101.

## UNSALEABLE ASSETS —

- valuation of, 558.

## USAGE —

- of partners, importance of attending to, 408 *et seq.*
- See CUSTOMS.

## USUAL COURSE OF BUSINESS —

- limits partner's implied authority to act for firm, 124 *et seq.*

## USURY —

- usurious loan held to constitute a partnership, 15, 16.

VENDOR AND PURCHASER OF BUSINESS —  
partners when, 28.

VALUATION —

agreements to take share at a, 429.  
no sale where there is, 555.  
unless agreement cannot be carried out, 555.  
how far binding on trustee in bankruptcy, 647.  
when court will enforce, 432.  
no right to have share of a deceased partner at, 592.  
action by one partner against another for amount of, 564.  
of unsalable property, 558.  
of shares, 426.  
charges in respect of, 384.  
debts incapable of, in bankruptcy, 708, 751, note (*m*).

VARIANCE —

between name of firm and name used on its behalf, consequence  
of, 185, 186.

VARYING —

articles of partnership, 409.

VERDICTS —

evidence of partnership, 90.

VESSELS —

joint ownership of, 60.

VINNIUS —

his definition of partnership, 4.

VOET —

his definition of partnership, 4.

VOLUNTARY SETTLEMENTS —

avoidance of by trustee of bankrupt, 664.

VOLUNTEERS —

commander of, liable for goods ordered by him for regiment, 50.

VOTE —

share in partnership, when a qualification for parliamentary, 348.

WAGES —

effect of paying, by a proportion of gross returns, 18.  
See PROFITS; SALARY.

WAIVER —

of clauses in partnership articles, etc., 408 *et seq.*  
of illegality, 104.  
of right to rescind for fraud, etc., 490.  
defense to an action for account, 516.

WAR —

effects of, on the rights of partners, 72, 92.  
a cause of dissolution of partnership, 585.

WARING, EX PARTE, 712.

application of rule in, 713.  
effect of rule in, 713.  
extent of application, 713.

WARRANT OF ATTORNEY —  
given by one partner, 272.

WATSON —  
his definition of partnership, 4.

WHALING VOYAGES —  
contracts between persons engaged in, 19, note (x).

WIDOWS —  
agreements as to annuities, 435.  
of deceased partner sharing profits, 36.

WIFE. See MARRIED WOMAN; HUSBAND.

WILFUL DEFAULT —  
against executors of partners, 612.  
against partners, 518, note (u).

WILFUL TORTS —  
liability of partners for, 149, 150.

WILL —  
partnerships at.  
    what are, 121.  
        by continuance after expiration of articles, 413.  
        actions for dissolution of, 586 *et seq.*  
        injunction in cases of, 540.  
        right to determine at any time by notice, 571.  
directing assets to be employed in business, effect of, 606 *et seq.*  
in the event of bankruptcy, 722.

WINDING UP (see Bk. IV; DISSOLUTION) —  
agency of partners continued for purposes of, 217-221.  
final settlement of accounts on, 402.  
where capital unequal and losses shared equally, 403.  
appointment of receivers in actions for, 546 *et seq.*  
matters involved in, 589.  
right of, personal to solvent partners, 670.

WITNESS —  
proof of partnership by, 90.  
by solicitors of the partners, 84, note (r).

WORK AND LABOR —  
action by one partner against another for, 567.

WRITS —  
service of, 266, 272. See SERVICE.

WRITTEN CONTRACT (see CONTRACT) —  
when binding on partners not named in, 178.  
not necessary to form a partnership, 80.  
not necessary to convert joint property into separate, or *vice versa*,  
324, 334.

WRONG-DOERS —  
contribution amongst, 377.

















